91-569

NO. _____

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF WASHINGTON;
WASHINGTON STATE PATROL;
GEORGE B. TELLEVIK,

Petitioners,

v.

CONFEDERATED TRIBES OF
THE COLVILLE RESERVATION;
LAWRENCE FRY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH O. EIKENBERRY
Attorney General
State of Washington

EDWARD B. MACKIE
Chief Deputy Attorneys General
Counsel of Record

WILLIAM BERGGREN COLLINS
Assistant Attorney General

Attorneys for Petitioners

7th Floor, Highways-Licenses Bldg.
Mail Stop: PB-71
Olympia, Washington 98504
(206) 753-6207

QUESTION PRESENTED

Is a state, which properly assumed Indian reservation jurisdiction pursuant to Pub. L. 83-280, nevertheless precluded from enforcing motor vehicle laws on state highways within an Indian reservation with respect to tribal members when the potential penalties do not include imprisonment?

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (continued)

Statutes

TABLE OF AUTHORITIES (continued)

Page

Other Authorities

NO. _____

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF WASHINGTON;
WASHINGTON STATE PATROL;
GEORGE B. TELLEVIK,

Petitioners,

v.

CONFEDERATED TRIBES OF
THE COLVILLE RESERVATION;
LAWRENCE FRY,

Respondents.

The petitioners, the State of Washington, the Washington State Patrol and George B. Tellevik, Chief of the Washington State Patrol, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 938 F.2d 146 (1991) and is reprinted in Appendix A, p. A-1. The memorandum decision of the United States District Court for the Eastern District of Washing-

ton (Quackenbush, J.D.) has not been reported. It is reprinted in Appendix B, p. B-1.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Pub. L. 83-280 (67 Stat. 588 (1953)), Wash. Rev. Code § 37.12.010 (1989) and Wash. Rev. Code § 46.63.020 (1989). These statutes are reprinted in Appendix C, pp. C-1, C-3 and C-4, respectively.

STATEMENT

1. Statutory background.

Washington has a uniform system of laws governing all individuals who operate a motor vehicle on public streets and highways. Washington prohibits speeding,[1] driving through stop signs or stop lights,[2] driving without headlights during periods of darkness,[3] reckless driving,[4] and driving under the influence of intoxicating liquor or drugs,[5] and other prohibited driving practices.

Historically, all Washington traffic offenses were punishable by *either* a monetary penalty or imprisonment, or both.[6] Subsequently, in 1976 the Legislature provided that some offenses were punishable solely by a monetary penal-

---

[1]Wash. Rev. Code § 46.61.400 (1989).

[2]Wash. Rev. Code § 46.61.050 (1989)

[3]Wash. Rev. Code § 46.37.020 (1989)

[4]Wash. Rev. Code § 46.61.500 (1989).

[5]Wash. Rev. Code § 46.61.502 (1989).

[6]*See* 1965 Wash. Laws, Ex. Sess., ch. 155, § 2; Wash. Rev. Code § 9.92.030 (1989).

ty.[7] For example, at present, speeding and failure to stop at a stop sign or stop light are punishable solely by a monetary penalty.[8] Reckless driving is punishable by a monetary penalty *or* imprisonment.[9] Driving while under the influence of intoxicating liquor or drugs is punishable by *both* a monetary penalty *and* imprisonment.[10]

Traffic offenses punishable solely by a monetary penalty are called traffic infractions.[11] Traffic infractions are prosecuted by the state before a court sitting without a jury. The burden is on the state to establish the commission of the infraction by a preponderance of the evidence.[12]

In 1953 Congress enacted Pub. L. 83-280 which authorized states to assume jurisdiction within Indian reservations.[13] In 1957, the State of Washington responded to Pub. L. 83-280 by enacting 1957 Wash. Laws, ch. 240, which obligated the State to assume criminal and civil jurisdiction over Indians and Indian territory when requested by the governing body of the Indian reservation. Subsequently, in 1963 Washington amended that statute to provide, without requiring tribal consent, criminal and civil jurisdiction on all Indian reservations, except for Tribal members on trust or Tribal properties. Wash. Rev. Code § 37.12.010 (1989)[14].

---

[7]1975-76 Wash. Laws, 2nd Ex. Sess., ch. 95, § 1.

[8]Wash. Rev. Code §§ 46.63.020, .110 (1989).

[9]Wash. Rev. Code §§ 46.63.020(33), 46.61.500, 9.92.030 (1989).

[10]Wash. Rev. Code §§ 46.63.020(34), 46.61.515 (1989).

[11]Wash. Rev. Code § 46.63.020 (1989).

[12]Wash. Rev. Code § 46.63.090 (1989).

[13]Pub. L. 83-280, § 2 is codified at 18. U.S.C. § 1162 (p. C-1). Pub. L. 83-280, § 4 is codified at 28 U.S.C. § 1360 (p. C-2). Pub. L. 83-280, § 6 is set out in 67 Stat. 589 (1953) (p. C-3).

[14]Washington acted pursuant to § 6, Pub. L. 83-280 which authorized states to assume jurisdiction over criminal offenses and civil causes of action in Indian country without consulting with or securing the consent of the Tribes that would be effected. *See State of Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 471-74 (1979).

The 1963 enactment further provided that for Tribal members on Tribal and trust properties, the State specifically obligated itself to exercise jurisdiction for eight specific subject areas including the "[o]peration of motor vehicles upon the public streets". Wash. Rev. Code § 37.12.010(8) (1989). In *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), this Court upheld the validity of Washington's assumption of jurisdiction in 1963.[15]

2. **Incident giving rise to this litigation.**

On May 21, 1988, Lawrence Fry, an enrolled member of the Colville Tribes, was issued a citation by a Washington State Patrol officer for speeding on State Highway 97 as it runs through the Colville Indian Reservation. State Highway 97 is a major public highway, built and maintained by the State of Washington.

After receiving the citation, Mr. Fry neither paid the prescribed monetary penalty for speeding, nor did he contest the citation in state court. Instead, Mr. Fry and the Confederated Tribes of the Colville Reservation instituted an action in Federal District Court for the Eastern District of Washington. Mr. Fry asserted jurisdiction pursuant to 28 U.S.C. § 1343 alleging that it was a violation of his civil rights to be subject to state court proceedings. The Colville Tribes asserted jurisdiction, both on their own behalf and on behalf of Mr. Fry, pursuant to 28 U.S.C. §§ 1331 and 1362, challenging the state's authority to issue citations to Tribal members for speeding on a state highway within the Colville Reservation and alleging infringement of their Tribal sovereignty.

The United States District Court granted the state defendants' cross-motion for summary judgment and ordered

---

[15]This is in contrast to the action of South Dakota. The very limited scope of jurisdiction asserted by South Dakota did not meet the requirements of Pub. L. 83-280. *See Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2009 (1991).

dismissal of the action (App. B, p. B-1). The District Court concluded that Washington courts have jurisdiction to hear cases involving traffic violations, occurring on public roads within the reservation, when such roads were built wholly or in part with government funds.

The Tribes and Mr. Fry appealed to the United States Court of Appeals for the Ninth Circuit, which on July 5, 1991, reversed the decision of the District Court. The Ninth Circuit concluded that the state cannot assert jurisdiction over Tribal members on the Colville Reservation for traffic infractions (App. A, p. A-1).

REASONS FOR GRANTING THE WRIT

1. The decision below departs from *Cabazon* by focusing primarily on the legal possibility of imprisonment instead of analyzing the state's public policy and the federal, Tribal, and state's interests.

In Part I of the decision below, *Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991), the primary holding is that Tribal members, driving on public roads[16] within the reservation, are not subject to the same traffic offenses as other drivers, unless those offenses carry the legal possibility of imprisonment. *Id.* at 148. The Ninth Circuit has established a per se rule that a state traffic offense cannot be applied to a Tribal member on the reservation, unless the offense is punishable by imprisonment.

In Washington if a motorist drove 85 miles per hour in a 55 miles per hour zone, the motorist might be cited for speeding (an infraction that is not punishable by imprisonment) or reckless driving (an offense that is punishable by

---

[16]This case concerns state jurisdiction on public roads built and maintained by Washington. It does not concern roads built and maintained by the Tribes. Also, this case does not present a question of whether the Tribes can exercise concurrent jurisdiction over their members, when state jurisdiction is acquired pursuant to Pub. L. 83-280. *See Washington v. Yakima Indian Nation*, 439 U.S. 466, 488, n. 32.

imprisonment), or both. Prior to the 1976 state removal of the remote prospect of imprisonment for speeding, a Colville Tribal member driving on a public highway within the reservation could be cited in the prior example for speeding or reckless driving. However, the Ninth Circuit has concluded that although the State did not change its public policy prohibiting speeding, it did lose jurisdiction by changing the punishment. The court's focus on the possibility of imprisonment as the test for state jurisdiction departs from this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

Cabazon concerned the application of § 2 of Pub. L. 280 (18 U.S.C. § 1162) which governs state "jurisdiction over offenses committed by or against Indians". *Cabazon* also concerns state jurisdiction over Tribal members in the absence of express congressional consent. With regard to criminal jurisdiction under Pub. L. 280, § 2, this Court, in drawing a distinction between "civil/regulatory" laws and "criminal/prohibitory" laws stated that the shorthand test is whether the conduct violates "the State's public policy." The Court said:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub L 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub L 280 does not authorize its enforcement on an Indian reservation. *The shorthand test is whether the conduct at issue violates the State's public policy.*

480 U.S. at 209 (emphasis added). But the Ninth Circuit made no inquiry regarding the state's public policy, it simply used the label "criminal."

In *Cabazon*, this Court did not end its analysis with Pub. L. 280, although the Tribes urged that it should. *Id.* at 214. The Court also discussed circumstances under which a state may exercise authority over the on-reservation activities of Tribal members, even in the absence of express congressional consent. *Id.* at 215. According to this Court

> [S]tate jurisdiction is preempted * * * if it interferes or is incompatible with federal and Tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.

480 U.S. at 216 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983)).

The tests that emerge from *Cabazon* are these: Under Pub. L. 280, § 2, the Court must determine if the conduct violates the state's public policy or, if state jurisdiction is not predicated upon Pub. L. 280, the Court must examine the federal, Tribal and state interests related to the assertion of state authority.

In *Cabazon* the Court applied these tests to the application of California gambling laws on a reservation. Although the violation of those laws included the legal possibility of imprisonment, the Court ruled that Pub. L. 280, § 2 did not apply. The Court reasoned that gambling did not violate California's public policy because "California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery". 480 U.S. at 211.

In weighing the federal, Tribal and state interests, the Court found that the employment and revenue from gambling fulfilled the overriding goal of Tribal self-sufficiency and economic development. 480 U.S. at 216. The Court concluded that the state interests at stake were not sufficient to justify the assertion of state authority over gambling on the reservation.

The Court applied a similar balancing test in *Rice v. Rehner*, 463 U.S. 713 (1983). *Rice* concerned state regulation of liquor sold on the reservation. The case did not involve Pub. L. 280 so the Court focused on the federal, Tribal and state interests. The only Tribal interest asserted was Indian self-governance. 463 U.S. at 721. And the Court found in "the area of liquor regulation * * * no 'congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.'"

Id. at 724. Against these limited federal and Tribal interests, the Court found an important state interest:

> The State has an unquestionable interest in the liquor traffic that occurs within its borders * * *. Liquor sold by Rehner to other Pala Tribal members or to nonmembers can easily find its way out of the reservation and into the hands of those whom, for whatever reason, the State does not wish to possess alcoholic beverages, or to possess them through a distribution network over which the State has no control.

463 U.S. at 724. Based on this balancing of interest, the Court gave little weight to any asserted interest in Tribal sovereignty. *Id.* at 725. The Court went on to find that "Congress authorized, rather than pre-empted, state regulation over Indian liquor transactions." *Id.* at 726.

The court below articulated the *Cabazon* test with regard to Pub. L. 280, § 2—whether the conduct at issue violates the state's public policy—but the court failed to apply it. The court focused instead on the absence of the legal possibility of imprisonment. The court stated:

> The Washington legislature in amending its traffic statutes carefully distinguished those offenses like speeding, which henceforth are subject to only civil penalties, from a long list of offenses like reckless driving or driving while intoxicated, which remain criminal. Speeding is now punishable by a set fine rather than a jail term[.]

938 F.2d at 148.

Except for its discussion of imprisonment, the court below failed to analyze the state's public policy. Traffic offenses such as speeding are against the public policy of Washington. When the state assumed jurisdiction on all Indian reservations in 1963, it specifically included in all situations the operation of motor vehicles on public streets. Wash. Rev. Code § 37.12.010(8) (1989).

The court below failed to consider the strong interest of the state to protect the lives and property of all users of its

highways both on and off the reservation. In 1990, there were 44,529 deaths as a result of motor vehicle crashes on the nation's highways.[17] In 1989, there were 41,300 fatal accidents in the United States.[18] The National Safety Council estimates that over 26 percent of these fatal accidents were the result of driving too fast.[19]

It is essential that persons driving on the same highways be subject to the same standards. Noncompliance with those standards and prohibitions increases the risks to all on the public highways. Accordingly, one of the primary purposes of the enforcement of motor vehicle operating standards is to reduce the degree of noncompliance and, thus, improve highway safety. Yet the Ninth Circuit concluded that Tribal members who use a highway in common with other motorists, are not even subject to those uniform standards and prohibitions that are not enforced with the sanction of imprisonment.[20] Furthermore, the circuit court decision is not predicated upon any requirement that the Tribe enact and enforce comparable standards for its members. If the court had so ruled, it would have meant that jurisdiction authorized by Congress and accepted by a state could be preempted by the unilateral act of a Tribe in enacting a traffic code.[21]

The court ignored the state's strong policy against prohibited driving practices. In contrast to *Cabazon*—where this Court noted that California actually promoted state gambling through the state lottery—Washington does not promote prohibited driving practices. Washington does not

---

[17]Ins. Inst. for Highway Safety, *Fatality Facts 1991* (1991) at 1.

[18]National Safety Council, *Accident Facts 1990 Edition* (1990) at 51.

[19]*Id.* at 62.

[20]Without stopping a vehicle, there is virtually no way a law enforcement office can determine whether the driver may have immunity from the application of various Washington traffic laws.

[21]In the instant situation, the Colville Tribe enacted as a tribal ordinance many provisions of the state traffic code.

promote speeding; Washington does not promote driving through stop signs and stop lights; Washington does not promote reckless driving; and Washington does not promote driving under the influence of intoxicating liquor or drugs.

The court below also failed to analyze the federal, Tribal and state interests involved in the enforcement of state motor vehicle laws with regard to Tribal members on the reservation.

The Ninth Circuit departed from this Court's decision in *Cabazon* by misconstruing the permissible scope of state jurisdiction authorized by Pub. L. 280 and by declining to analyze the state's policy and the federal, Tribal and state interests involved. Instead, the Court established a per se rule—if an offense does not include the legal possibility of imprisonment, the law cannot be enforced against Tribal members on the reservation.

2. **The decision below is in conflict with a decision from the Seventh Circuit.**

The reasoning in Part II of the decision below is in conflict with *St. Germaine v. Circuit Court for Vilas Cy.*, 938 F.2d 75 (7th Cir. 1991). Part II provides an alternate holding that Pub. L. 280 does not apply because speeding is a subset of the permitted activity of driving. The Ninth Circuit said:

> Thus, although the government is correct that *speeding* remains against the state's public policy, *Cabazon* teaches that this is the wrong inquiry. *Cabazon* focuses on whether the prohibited activity is a small subset or facet of a larger, permitted activity—high-stakes unregulated bingo compared to all bingo games—or whether all but a small subset of a basic activity is prohibited. * * *
>
> We conclude that unregulated, high-stakes bingo was an extreme extension of a permitted activity, it was incident to that general activity and thus lay within the ambit of that activity. Similarly, here speeding is but an extension of driving—the permitted activitity—which occasionally is incident to the operation of a motor vehicle.

938 F.2d at 148-49.

The logic of the Ninth Circuit's application of a kind of "set theory" is amazing and the consequences are severe. That characterization is that even prohibited driving practices are merely a subset of driving which is permitted. Under that approach or rationale, illegal drug use is simply a subset because there are legal uses of prescription drugs. *Cabazon* was not based on such a metaphysical test. It was based on a thorough analysis of California's public policy with regard to gambling—an analysis the court below declined to undertake.

Under the Court's reasoning in Part II of the decision, Washington could not enforce its speed restrictions even if the penalty included the possibility of imprisonment. Taken to its logical conclusion, reckless driving and driving under the influence of intoxicating liquor and drugs are also subsets of the permitted activity of driving, even though both offenses are punishable by imprisonment. The decision invites a challenge by such offenders.

The Court's reasoning in Part II is in direct conflict with *St. Germaine*. In that case, "an enrolled member of the tribe of Lac du Flambeau Band of Lake Superior Chippewa Indians, was convicted in state court of operating his motor vehicle on a state highway within the reservation after his driver's license had been suspended." 938 F.2d at 75. The Court of Appeals for the Seventh Circuit undertook the proper inquiry and analyzed state policy. The Seventh Circuit ruled that the Wisconsin State Motor Vehicle Code applied to the Tribal member on the reservation. The court said:

> Wisconsin does not seek to do something on the reservation to Indians that it does not do everywhere in the state and to all offenders. It is understandably an important matter of Wisconsin public policy to protect the lives and property of all users of its highways, on or off the reservation, Indians or non-Indians.* * * The shorthand test the Court prescribes is based on a determination of whether the conduct at issue violates the state's public policy. * * * The State of Wisconsin seeks to protect the lives and property of highway

> users from all incompetent, incapacitated, and dangerous drivers anywhere on its highways on a reservation or off. A clear and mandatory criminal penalty is imposed to enforce its prohibitions. This is public policy enforcement of high order. The state's public policy of enforcing this criminal penalty and deterring dangerous drivers does no violence to any tribal vehicle regulation which the tribe enforces.

938 F.2d at 77.

This statement of Wisconsin public policy is equally applicable to the State of Washington. Both states strive in an evenhanded manner to protect the lives and property of highway users from the actions of dangerous drivers.

The conflict between the reasoning in Part II of the Ninth Circuit's decision and the reasoning in the Seventh Circuit's decision in *St. Germaine* is obvious. The Ninth Circuit—applying a kind of "set theory—reasoned that traffic offenses were not applicable to Tribal members on the reservation because driving offenses were merely a subset of driving. The Seventh Circuit—applying the public policy test in *Cabazon* to the same subject matter, *i.e.*, traffic codes—reasoned that traffic offenses were applicable to Tribal members on the reservation because of the state public policy of deterring dangerous driving.

3. **This case is the appropriate vehicle to resolve the issues raised by the decision below.**

The Ninth Circuit's departure from *Cabazon*, by establishing a per se test, *i.e.*, possibility of imprisonment is an important question of federal law that should be resolved by this Court.

In *Bryan v. Itasca Cy.*, 426 U.S. 373 (1976), this Court ruled that Pub. L. 280, § 4 granted state jurisdiction over private civil litigation involving reservation Indians in state court. *Bryan* noted that it was not authorization for a general extension of state regulatory jurisdiction. The underpinning of that conclusion was a concern which was consistent with the House Committee Report on HR 1063 (Pub. L. 83-280) that the legislation "should retain the ap-

plication of Indian Tribal customs and ordinances to civil transactions among the Indians, insofar as those customs and ordinances are not inconsistent with applicable state laws." 1953 U.S. Code Cong. & Admin. News, 2412. The concerns of *Bryan* not to permit states to override Tribal customs has lead to the distinction between the state's enforcement of its public policy by prohibitory laws on one hand and state regulatory actions on the other.

In *Cabazon* this Court, in light of that distinction, ruled that the state did not have jurisdiction over offenses under Pub. L. 280, § 2, simply because the violation of state law was punishable by imprisonment. The focus of this Court in *Cabazon* was upon the state's public policy, not the punishment involved. The Ninth Circuit has taken the major step to conclude that the possibility of imprisonment is a prerequisite for jurisdiction under Pub. L. 280, § 2—even if there is no question that the prohibited activity violates the state's public policy. This is an important question of federal law that should be resolved and rejected by this Court.

This case presents this issue cleanly and directly because the only variable is the punishment imposed for violating the law. Prior to 1976 speeding was punishable by a monetary penalty or imprisonment. Subsequently, the possibility of imprisonment was removed. The public policy of the state to deter dangerous driving remained unchanged. The only change was the punishment for speeding. Thus, the question is directly presented whether eliminating the possibility of imprisonment automatically eliminates state jurisdiction over offenses pursuant to Pub. L. 280, § 2.

This question also has significance beyond the state of Washington. Many states have adopted motor vehicle laws that are enforced by monetary penalties and do not include the possibility of imprisonment.[22] Under the Ninth Circuit's decision those laws could not be enforced with regard to a Tribal member on a public highway within an Indian

---

[22]*See, e.g.*, Note, *Civil Infractions for Minor Traffic Offenses: Michigan's New Motor Vehicle Code*, 26 Wayne L. Rev. 1543, 1558-60 (1980).

reservation. The absence of the remote legal possibility of imprisonment would automatically exclude state jurisdiction pursuant to Pub. L. 280, § 2 without any consideration being given to the public policy of the state. This is an important question of public safety that should be addressed by this Court.

Finally, the conflict between the reasoning of Part II of the Ninth Circuit's decision and the reasoning of the Seventh Circuit's decision in *St. Germaine* is significant. The 50 states are responsible for enforcing traffic laws on the public highways within these states. This has been a traditional state activity—not a federal or Tribal activity. The "set theory" advanced by the court below questions the enforceability of those laws on Indian reservations with regard to Tribal members and is in conflict with the Seventh Circuit. The conflict between the circuits goes to the heart of a traditional state responsibility. This Court should grant certiorari to resolve this matter.

CONCLUSION

For these reasons we respectfully request that the writ be granted.

DATED this 3rd day of October, 1991.

Respectfully submitted,

KENNETH O. EIKENBERRY,
Attorney General

EDWARD B. MACKIE
Chief Deputy Attorney General
Counsel of Record

WILLIAM BERGGREN COLLINS,
Assistant Attorney General

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION; LAWRENCE FRY,

Plaintiffs-Appellants,

V.

STATE OF WASHINGTON; WASHINGTON STATE PATROL; GEORGE B. TELLIVEK,

Defendants-Appellees.

NO. 89-35025
D.C. No. CV-88-394 JLQ

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, District Judge, Presiding

Argued and Submitted
January 9, 1990—Seattle, Washington

Filed July 5, 1991

Before: M. Oliver Koelsch, James R. Browning and Robert R. Beezer, Circuit Judges.

Opinion by Judge Koelsch

SUMMARY

Jurisdiction

Reversing a district court judgment, the court of appeals held that the State of Washington (the State) did not have jurisdiction over on-reservation Indians to enforce its statute prescribing speed limits for motor vehicles operated upon public roads within the reservation.

Appellants Confederated Tribes of The Colville Reservation challenged the State of Washington's enforcement of traffic laws within the reservation. Washington treats speeding as a civil, not a criminal offense. The Tribe sought a declaration prohibiting the State from enforcing its asserted traffic violation and a judicial declaration that the matter is governed by tribal law and enforceable only by officers duly commissioned by the Tribes and in the Tribes' own court. The district court entered judgment for the State.

[1] States have been authorized to impose both civil and criminal state laws within the reservations. [2] While the delegated powers to the states over criminal matters are broad, the scope of the provision relating to civil matters is very limited. [3] The issue was whether or not the Washington law relating to speeding should be classified either as criminal/prohibitory or civil/regulatory. The shorthand test was whether the conduct at issue violated the State's public policy.

[4] The Washington legislature in amending its traffic statutes carefully distinguished those offenses like speeding, which are now subject to only civil penalties, from a long list of offenses like reckless driving or driving while intoxicated, which remain criminal. [5] The Washington State courts have found a traffic infraction not to be a felony or misdemeanor. [6] Thus, the State's avowed public policy is served by treating speeding as a civil/regulatory offense. [7] To look to the Tribes rather than the State for traffic enforcement on the reservation will not detract from Washington's determination to discourage speeding. [8] The court noted that concern for protecting Indian sovereignty from state interference prompted courts to develop the criminal/prohibitory, civil regulatory test. Under it, the State may not assert jurisdiction over tribal members on the Colville reservation.

COUNSEL

Michael Taylor, Colville Confederated Tribes, Nespelem, Washington, for the plaintiffs-appellants.

Edward Mackie, Assistant Attorney General; Timothy R. Malone, Assistant Attorney General, Olympia, Washington, for the defendants-appellees.

OPINION

KOELSCH, Circuit Judge:

This appeal involves a dispute between the Confederated (Indian) Tribes of the Colville Reservation together with Lawrence Fry, an enrolled member (the Tribes), and the State of Washington with respect to one of the latter's motor vehicle traffic laws.

The issue is one of law: does the State of Washington possess jurisdiction over on-reservation Indians to enforce its statute prescribing speed limits for motor vehicles operated upon public roads within, and thus a part of, the reservation?

The District Court concluded that the answer is "yes". We disagree.

The facts are undisputed: on May 21, 1988, Lawrence Fry, an enrolled member of the Tribe, while operating his motor vehicle on Highway 97 within the Reservation was stopped by a Washington State Patrol officer for exceeding the Washington State speed limit. The officer was not commissioned by the Tribe to enforce tribal traffic laws; because Washington treats speeding as a civil, not a criminal, offense, the officer gave Fry a civil complaint pursuant to RCW 46.63.

However, Fry did not pay the prescribed fine nor contest the complaint in state court; instead he and the Tribes commenced this action in the Federal District court seeking to prohibit the State from enforcing its asserted traffic violation and to secure a judicial declaration that the matter is

governed by tribal law and enforceable only by officers duly commissioned by the Tribes and in the Tribes' own court.

[1] Historically, the power to legislate in both criminal and civil matters concerning Indians and their acts and conduct upon their reservations lay exclusively with the Congress and the tribes themselves. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214 (1987). However, in 1953 Congress enacted Public Law 280, which delegated to the states power to impose state laws, both civil and criminal, within the reservations. Public Law 83-280, 67 Stat. 588.[1] Because Congress' "primary concern", *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976), lay in the lawlessness on some reservations and the absence of tribal institutions for law enforcement, it delegated to the States broad powers over criminal matters. Thus, section 2, 18 U.S.C. § 1162 reads as follows:

> § 1162. State jurisdiction over offenses committed by or against Indians in the Indian country
> (a)* * *[t]he States* * * shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country * * * to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State * * *.

Pub. L. 83-280, § 2, 18 U.S.C. § 1162.

[2] In marked contrast, the scope of the provision relating to civil matters is very limited. It provides:

---

[1]In 1963, Washington assumed criminal and civil jurisdiction for acts committed by Indians on Indian lands in eight specific subject areas, including the operation of motor vehicles on public roads. RCW 37.12.010. To assume jurisdiction beyond these eight areas, Washington needed either an express grant from Congress or tribal consent. A subsequent statute, the Indian Civil Rights Act, 82 Stat. 78, 25 U.S.C. §§ 1321-1326, imposed a more stringent tribal consent requirement for a state to assume jurisdiction over Indians on Indian land, but the change did not affect any cession of jurisdiction already made. 25 U.S.C. § 1323(b); 25 U.S.C. § 1321(a), 1322(a).

> § 1360. State civil jurisdiction in actions to which Indians are parties
>
> (a) * * * [T]he States * * * shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country * * * to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State * * *.

Pub. L. 83-280, § 4, 28 U.S.C. § 1360.

Moreover, as the Court in *Bryan* noted, it was not the Congress' intention to extend to the States the "full panoply of civil regulatory powers," 426 U.S. at 388, but essentially to afford Indians a forum to settle private disputes among themselves.

[3] Both the Tribes and the State agree the dispute in this instance is not within the purview of section 4. Rather, the issue is whether or not the Washington law relating to speeding should be classified either as criminal/prohibitory or civil regulatory. *Barona Group of Captian* [sic] *Grande Band of Mission Indians, San Diego County, Cal. v. Duffy*, 694 F.2d 1185, 1188 (9th Cir. 1982). If the former, then Washington possesses jurisdiction and its law can be enforced, but if the latter then such power is lacking. Laws which prohibit absolutely certain acts fall into the first category, while those generally permitting certain conduct but subject to regulation are within the second. "The shorthand test is whether the conduct at issue violates the State's public policy." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987).

I.

Turning now to the issue under consideration, it appears that in 1979 the state legislature amended Washington's traffic offense statutes to "decriminalize" several traffic offenses, including speeding, and designated each as a "traffic infraction": "a traffic infraction may not be classified as a criminal offense." RWC [sic] 46.63.020. Although this language is clear and unequivocal, in an inquiry such

as this we must examine more than the label itself to determine the intent of the State and the nature of the statute, *Cabazon*, 480 U.S. at 221 n.10, keeping in mind that "the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973), quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945). Thus, Indian tribal sovereignty provides the "backdrop against which the applicable * * * federal [and state] statutes must be read." *McClanahan*, 411 U.S. at 172.

[4] The Washington legislature in amending its traffic statutes carefully distinguished those offenses like speeding, which henceforth are subject to only civil penalties, from a long list of offenses like reckless driving or driving while intoxicated, which remain criminal. Speeding is now punishable by a set fine rather than a jail term; the monetary penalty imposed for violation may not exceed $250; the penalty must be paid by its due date, else the offender's driver's license is not renewed until the fine and a late fee is received; and should the driver contest the complaint he is not allowed a jury trial. RCW 46.63.020, 090, 110.

[5] By decriminalizing these offenses, the legislature aimed to "promote the public safety and welfare on public highways and to facilitate the implementation of a uniform and expeditious system for the disposition of traffic infractions." The Washington state courts have found a traffic infraction not to be a felony or misdemeanor. *See, e.g., City of Wenatchee v. Durham*, 43 Wn. App. 547, 551 n.3, 718 P.2d 819, 822 n.3 (1986). And the Washington Attorney General has opined that traffic infractions are "no longer a criminal offense", 4 Op. Att'y Gen. 2 (1981).

[6] Thus, the state's avowed public policy is served by treating speeding as a civil/regulatory offense. Indeed, to treat it otherwise would allow Washington to have it both ways. We conclude the state may not declare certain infractions as civil, remove the panoply of constitutional and procedural protections associated with criminal offenses, save itself the time and expense of criminal trials, and then in-

sist the same infraction is criminal for purposes of expanding state jurisdiction and appropriating the revenue raised through enforcement of the speeding laws. *See Mayers v. United States Dept. of Health and Human Services*, 806 F.2d 995, 998 (11th Cir. 1986) (if statute criminal in nature, procedure employed constitutionally inadequate).

II.

Several cases applying the civil/regulatory versus criminal/prohibitory test support this conclusion. In *Cabazon*, the Court held a California law establishing misdemeanor criminal penalties for operating bingo games except in accord with specific regulations was civil/regulatory and therefore unenforceable on an Indian reservation. *Cabazon*, 480 U.S. at 211. The Court concluded "in light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular." *Id.* The Court rejected California's argument that high stakes, unregulated bingo was prohibited and a misdemeanor, and therefore against public policy. As it said: "[b]ut that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of P.L. 280." *Id.*

[7] Thus, although the government is correct that *speeding* remains against the state's public policy, *Cabazon* teaches that this is the wrong inquiry. *Cabazon* focuses on whether the prohibited activity is a small subset or facet of a larger, permitted activity—high-stakes unregulated bingo compared to all bingo games—or whether all but a small subset of a basic activity is prohibited. Thus, in *United States v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1977) we found Washington's fireworks statute to be criminal/prohibitory because, with very limited exceptions, Washington prohibited all private possession and sale of fireworks. To allow tribal members to operate fireworks stands on reservations would "entirely circumvent Washington's determi-

nation that the possession of fireworks is dangerous," *Marcyes*, 557 F.2d at 1364. But to look to the Tribes rather than the state for traffic enforcement on the reservation will not detract from Washington's determination to discourage speeding.[2]

We conclude that unregulated, high-stakes bingo was an extreme extension of a permitted activity, it was incident to that general activity and thus lay within the ambit of that activity. Similarly, here speeding is but an extension of driving—the permitted activity—which occasionally is incident to the operation of a motor vehicle.

[8] Concern for protecting Indian sovereignty from state interference prompted courts to develop the criminal/prohibitory—civil regulatory test. *United States v. Dakota*, 796 F.2d 186, 188 (6th Cir. 1986). That concern leads us to resolve any doubts about the statute's purpose in favor of the Indians. *See Bryan*, 426 U.S. at 392. Indian sovereignty and the state's interest in discouraging speeding are both served by our decision here: the Tribes have enacted a traffic code, employ trained police officers, and maintain tribal courts staffed by qualified personnel to deal with criminal traffic violations. The Tribes are willing and able to enforce their own traffic laws against speeding drivers and even to commission Washington state patrol officers to assist them. We conclude RSW [sic] 46.63 should be characterized as a civil, regulatory law.[3] Under it, the state may not assert jurisdiction over tribal members on the Colville reservation.

REVERSED with directions to the District Court to grant Appellants the relief sought.

---

[2]Thus, we reject the state's argument that uniformity in highway safety laws requires state jurisdiction, at least where the Tribes have shown their own highway safety laws and institutions are adequate for self-government. *Cf. County of Vila v. Chapman*, 361 N.W. 2d 699 (Wis. 1985) (tribe had no tradition of self-government in the area of traffic regulation).

[3]Our disposition makes it unnecessary for us to address the Tribes' other arguments on appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES OF
THE COLVILLE RESERVATION,
on their own behalf and on behalf of
Lawrence Fry, and Lawrence Fry
on his own behalf,

Plaintiffs,

V.

The State of Washington,
The Washington State Patrol,
and George B. Tellivek, Chief of the
Washington State Patrol,

Defendants.

No. C-88-394-JLQ

ORDER GRANTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

BEFORE THE COURT are plaintiffs' motion for summary judgment or, in the alternative, for preliminary injunction, and defendants' cross-motion for summary judgment. A hearing was held on October 3, 1988. Plaintiffs were represented by Michael Taylor. Terese Neu Richmond appeared for defendant. Having reviewed the record, heard from counsel, and being fully advised in this matter, this order is intended to memorialize the court's ruling on this matter.

FACTUAL BACKGROUND

State Highway 97, a highway built and maintained by the State of Washington, runs through the Colville Indian Reservation. On May 21, 1988, Lawrence Fry, an enrolled

member of the Colville tribes, was issued a citation by a Washington State Patrol officer for speeding on Highway 97. The citation required that he appear before the State District Court for Okanogan County. Plaintiffs challenge this procedure as an infringement on tribal sovereignty and their civil rights under federal law, in violation of Congress' limited grant of jurisdiction to the states through Public Law 280 and 25 U.S.C. § 1326. Plaintiffs claim that Mr. Fry's traffic charge must be tried in the Colville Tribal Court. Plaintiffs also assert that this unlawful state action deprives them of the revenues derived from traffic enforcement and deprives them of the right to consent to any new exercise of state jurisdiction mandated by 25 U.S.C. § 1326. They ask the court to declare that the state must utilize tribal law and the Colville Tribal Court in its enforcement scheme when Indians are cited for infractions occurring on the reservation.

The Tribes have enacted their own civil infraction traffic code, based on Washington's statutes, which is enforced by tribal police and tribal courts (Ct.Rec. 5, Ex. D). The Tribes have issued tribal police commissions to area city and county police so that they may enforce tribal law on the reservations. The State of Washington has not accepted such commissions. (Ct. Rec. 5, Ex. C).

ANALYSIS

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d 1129 (9th Cir. 1975). Although the parties have not submitted statements of material fact, as required by Local Rule 56, both parties base their motions on the lack of any material facts in dispute. The issues raised in this complaint and these motions are pure issues of law. Therefore, summary judgment is appropriate.

Legislative Background

In 1953, by enactment of Pub.L.No. 83-280, 67 Stat. 588, (Pub.L. 280) Congress delegated to the states some of

its power to regulate affairs on Indian reservations. *United States v. Farris*, 624 F.2d 890, 894 (9th Cir. 1977). Section 7 provided:

> The consent of the United States is hereby given to any [] State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Pub. L. 280, Laws of 1953, Chapter 505. This law was designed to end the federal government's responsibility toward the Indians by consenting to an affirmative assumption of civil and criminal jurisdiction by the states. *State ex rel. Adams v. Superior Ct.*, 57 Wn.2d 181, 183, 356 P.2d 985 (1960). In 1957, the state of Washington responded to this offer by enacting Ch. 240, § 1, which stated that:

> The state of Washington hereby obligates and binds itself to assume, as hereinafter provided, criminal and civil jurisdiction over Indians and Indian territory, reservation, country and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session.)

In 1963, Washington amended that section, limiting its assumption of criminal and civil jurisdiction for acts committed by Indians on Indian lands to eight specific subject areas, chiefly welfare, family law and motor vehicles. RCW 37.12.010.[1] Subsequent challenges of the method by which

---

[1]RCW 37.12.010 states:

"Assumption of criminal and civil jurisdiction by the state. The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and land within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

the state legislature authorized assumption of jurisdiction over Indians,[2] the language of the statute,[3] and the assumption of only partial jurisdiction,[4] have been unsuccessful.

With the exception of the eight enumerated areas of RCW 37.12.010, Washington state courts lack jurisdiction over Indians on Indian lands beyond that expressly granted by Congress, absent tribal consent. *State ex. rel. Adams v. Superior Ct.*, 57 Wn.2d 181, 185, 356 P.2d 985 (1960); *United States v. Farris*, 624 F.2d 890, 895 (9th Cir. 1980). Such consent was granted by the Colville Tribes[5] in January 1965, when the Colville Business Council issued Resolution 1965-4 requesting that the state of Washington assume complete criminal and civil jurisdiction. Pursuant to this request and the authority conferred by Pub.L. 280, Gover-

---

(Footnote Continued)

"(1) Compulsory school attendance;

"(2) Public assistance;

"(3) Domestic relations;

"(4) Mental illness;

"(5) Juvenile delinquency;

"(6) Adoption proceedings;

"(7) Dependent children; and

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: Provided further, That Indian Tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

[2]States such as Washington, whose constitutions or statutes contained organic law disclaimers of jurisdiction over Indian country, were dealt with in § 6 does not require disclaimer states to amend their constitutions to make an effective acceptance of jurisdiction. In addition, any Enabling Act requirement of such a nature was held to have been effectively repealed by § 6. *Washington v. Yakima Indian Nation*, 439 U.S. 463,

nor Daniel J. Evans issued a proclamation assuming, on behalf of the State, the requested jurisdiction. *Tonasket v. State*, 84 Wn.2d 164, 166, 525 P.2d 744 (1974).

In 1968, Congress passed the Indian Civil Rights Act. 82 Stat. 78, 25 U.S.C. §§ 1321-1326. The effect of this act was to retract from the states some of the power conferred by Pub.L. 280. Title IV repealed § 7 of Pub.L. 280, with the

---

(Footnotes Continued)

493 (1979). The Washington Supreme Court likewise held that the legislative method of assuming state civil and criminal jurisdiction was not a violation of the state's enabling act or constitution, nor was it a violation of the method prescribed in Public Law 83-280 for the assumption of such jurisdiction. *Makah Indian Tribe v. State*, 76 Wn.2d 485, 491, 457 P.2d 590 (1969).

[3]In *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979), the Supreme Court held that Yakima tribe's challenge that chapter 36 was void for indefiniteness was without merit.

> Chapter 35 creates no new criminal offenses but merely extends jurisdiction over certain classes of offenses defined elsewhere in state law. * * * The eight subject matter areas are themselves defined with reasonable clarity in language no less precise than that commonly accepted in federal jurisdictional statutes in the same field. (cite omitted) The District Court's ruling that Chapter 36 is not void for vagueness under the Due Process Clause of the Fourteenth Amendment was therefore correct.

Id. at 469 n. 5.

[4]The Supreme Court recognized that under the laws in effect in 1963 the State of Washington could have unilaterally extended full jurisdiction over crimes and civil causes of action on Indian reservations. Therefore, it was unwilling to find that by "asserting a less intrusive presence on the Reservation while at the same time obligating itself to assume full jurisdictional responsibility upon request" the state had somehow flouted the will of Congress. The court went on to say that "[a] state that has accepted the jurisdictional offer in Pub. L. 280 in a way that leaves substantial play for tribal self-government, under a voluntary system of partial jurisdiction that reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within a reservation, has plainly taken action within the terms of the offer made by Congress to the States in 1953. *Washington v. Yakima Indians*, 439 U.S. 463, 499 (1979).

effect that tribal consent is now required as a condition to further state assumptions of jurisdiction.[6] However, Congress provided that "this repeal shall not affect any cession of jurisdiction made pursuant to [section 7] prior to its re-

---

(Footnotes Continued)

[5]The Colville Confederated Tribes consist of 11 separate Indian tribes placed upon the Colville Indian Reservation in 1872. The confederacy is recognized by the Bureau of Indian Affairs and is governed by a tribal business council pursuant to a constitution and bylaws adopted and officially approved in 1938. *Tonasket v. State*, 84 Wn.2d 164, 165-66, 525 P.2d 744 (1974).

[6]25 U.S.C. § 1321(a) provides:

"The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State." (Emphasis added).

25 U.S.C. § 1322(a) provides:

"The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State."

peal. 25 U.S.C. § 1323(b). Previous assumptions of jurisdiction, such as RCW 37.12.010, remained valid unless retroceded by the State back to the United States. *Latender v. Israel*, 584 F.2d 817 (7th Cir.), *cert. denied*, 440 U.S. 1850 (1978).

The tribal consent required by Title IV must be manifested by a majority vote of the enrolled Indians within the affected area of Indian country.[7] Legislative action by the Tribal Council does not comport with the explicit requirements of the act. *Kennerly v. District Ct. of Montana*, 400 U.S. 423, 429 (1971). Thus, although RCW 37.12.010 would have been invalid if it were passed for the first time after 1968, it is recognized as a valid assertion of jurisdiction over the eight enumerated areas, including motor vehicles. *United States v. Farris*, 624 F.2d 890, 895 n.2 (9th Cir. 1980).

In 1986, the Colville Tribes requested, and the legislature and governor granted, retrocession of the broad grant of jurisdiction over both criminal and civil matters to the Tribes (Ct. Rec. 13, p. 14). The result was that the state retained only the limited jurisdiction asserted under RCW 37.12.010. Whether the state had the authority in the first instance to assert both criminal and civil jurisdiction over

---

[7]25 U.S.C. § 1326 provides:

"State jurisdiction acquired pursuant to this title [25 USC §§ 1321 et seq.] with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 percent of such enrolled adults."

the operation of motor vehicles, therefore, becomes the critical factor here. *Civil v. Criminal Classification*

Under RCW 37.12.010, Washington assumed jurisdiction over Indians and Indian lands for both civil and criminal matters involving the operation of motor vehicles. In 1979, the state legislature amended Washington's traffic offense statutes to decriminalize certain offenses so as to "promote the public safety and welfare on public highways and to facilitate the implementation of a uniform and expeditious system for the disposition of traffic infractions." RCW 46.63.010. Pursuant to the amendment, only those offenses enumerated in RCW 46.63.020, or their equivalents in local laws or ordinances, remain classified as criminal offenses. All other traffic offenses, including speeding, are now classified as "traffic infractions". Jurisdiction to hear traffic infractions was conferred upon the district and municipal courts, rather than the superior court. RCW 46.63.040.

Plaintiffs argue that the effect of decriminalization of traffic offenses, and the conferring of jurisdiction on district courts to hear infractions, represents a new form of jurisdiction being asserted by the state, and as such requires the consent of a majority of the enrolled members of the Colville Tribes. Plaintiffs therefore ask the court to declare that the Washington State Patrol lacks authority to order Indians cited for traffic infractions on the reservation to appear before the state district court. Although plaintiffs' argument has some merit, it is not persuasive.

Plaintiffs argue that, should the court find that the state's assumption of jurisdiction over motor vehicles lies outside the scope of Pub. L. 280, or 25 U.S.C. §§ 1321 and 1322, then two barriers exist to the state's exercise of jurisdiction. First, the exercise of such authority may be preempted by federal law. Second, state jurisdiction may infringe upon the right of Indians to establish and maintain tribal self-government. *Yakima Indian Nation v. Whiteside*, 617 F. Supp. 735, 746 (D.C. Wash. 1985), *cert. granted*, 108 S.Ct. 2843; *Rice v. Rehner*, 463 U.S. 713, 718-19 (1983).

"State jurisdiction is preempted by federal law if it interferes with or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Whiteside, supra* at 746. Federal preemption may result from either a specific treaty between the tribe and the federal government, *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 172 (1973), or by pervasive federal regulation in a defined area which excludes state intervention. *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 690 (1965). Although the parties have cited no treaty provisions or federal regulation supporting a finding of preemption in the area of traffic regulation, this court finds it unnecessary to resolve this issue, in light of its determination of this case, *infra*.

The second barrier to the exercise of state jurisdiction is if it may infringe upon the right of Indians to establish and maintain tribal self-government. This issue is closely intertwined with preemption analysis. In *Rice v. Rehner*, 463 U.S. 713 (1983), the Supreme Court stated:

> When we determine that tradition has recognized a sovereign immunity in favor of the Indians in some respect, then we usually are reluctant to infer that Congress has authorized the assertion of state authority in that respect except where Congress has expressly provided that State laws shall apply. Repeal by implication of an established tradition of immunity or self-governance is disfavored. If, however, we do not find such a tradition, or if we determine that the balance of state, federal, and tribal interests so requires, our preemption analysis may accord less weight to the "backdrop" of tribal sovereignty.

Id. at 719-20.

The Tribes assert that they have a strong tradition of self-government, not only in the area of traffic "regulation," but in other areas as well. Coupled with this tradition of self-government, is the recognized importance of developing and utilizing Indian resources to the point where the Indians will be able to "fully exercise responsibility for the utilization and management of their own resources and where

they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 1092, n.19, quoting 15 U.S.C. § 1451). In *Cabazon* the Supreme Court quoted the President's 1983 Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. (Jan. 24, 1983), in which he stated that it is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government. Id. at 1092 n.20. "Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Id.* at 1093. The Tribes argue persuasively that absent the revenues from enforcement of traffic regulations, their ability to adequately fund their courts will be impaired. However, only those revenues lost from State Patrol citations are at issue here. The Tribes have offered no evidence regarding the extent of such lost revenues.

Wisconsin courts have, a number of times, addressed the question of state jurisdiction on public roads over reservation lands. In *State v. Lemieux*, 317 N.W. 2d 166 (Wis. App. 1982), the appellate court held that the state had failed to meet its burden to overcome the presumption that it lacked jurisdiction. *Lemieux* involved an enrolled member charged with possession of a loaded firearm in a vehicle traveling on a public road within the Bad River Indian Reservation. The court agreed that the statute prohibited, rather than regulated the behavior charged, but held that, in the absence of penal sanctions, it was not an offense over which the state acquired criminal jurisdiction under Pub.L. 280. The statute in question provided that violations were punishable by a forfeiture of not more than $100, combined with a natural resources assessment equal to 75 percent of the amount of the forfeiture. The court stated that

> [t]he purpose of construing ostensibly criminal statutes as civil regulatory statutes is to prohibit a state from extending its jurisdiction beyond that granted by Congress simply by making a wide range of conduct

> punishable by penal sanctions* * * .Absent any authority in which civil statutes have been deemed "criminal" for purposes of Pub.L. 280 jurisdiction and in light of the policy underlying the construction of criminal statutes set forth in [*United States v.*] *Marcyes*, [557 F.2d 1361 (9th Cir. 1977)] we cannot conclude that the state has jurisdiction to enforce sec. 29.224(2) under the criminal jurisdiction grant of Pub.L. 280.

Id. at 168. The court then went on to reject civil jurisdiction under Pub.L. 280, because that section affects only private civil litigation. Finally, the court rejected jurisdiction independent of that conferred by Pub.L. 280, on the basis that there was no specific grant of jurisdiction to the states; therefore, the presumption is that the state lacks jurisdiction. *Id.* at 169.

A year later the Wisconsin Supreme Court faced this issue in *State v. Webster*, 338 N.W. 2nd 474 (Wis. 1983). It held that the State did not have jurisdiction to prosecute enrolled Menominee Indians for traffic offenses committed on the state highway within the reservation boundaries. In reaching this decision, the court relied upon an unusual series of events whereby the federal government terminated the Tribe's status in 1954, thereby rendering the tribe subject to state jurisdiction, but later restored its tribal status. Pursuant to the Restoration Act, Wisconsin had retroceded its state jurisdiction over the reservation. Applying the analysis contained in *Rice v. Rehner*, 463 U.S. 713 (1983), the court concluded that (1) the Menominee Tribe had a tradition of tribal self-government in the area of traffic regulation, (2) the balance of state, federal and tribal interests in the regulation of Highway 47 tipped in favor of the Tribe where the conduct involved only Indians, (3) the federal government, under 18 U.S.C. § 1152, had granted the Indians jurisdiction over certain offenses, including those of the type charged, and (4) a finding of state jurisdiction would interfere with tribal self-government and impair a right granted or reserved by federal law. *Id.* at 482-83.

Two years later the Wisconsin Supreme Court reached the opposite conclusion, in *Vilas Cy. v. Chapman*, 361

N.W.2d 211 (Wis. 1985). Chapman had been charged with operating a motor vehicle after revocation, operating a motor vehicle while under the influence of an intoxicant, and operating a motor vehicle without a valid Wisconsin driver's license. The parties had agreed that the ordinance violation with which Chapman was charged was neither a crime nor a civil cause of action but, rather, was a civil regulatory matter, and that Pub.L. 280 did not address civil regulatory jurisdiction. *Id.* at 703. The court applied the *Rice* and *Webster* analysis, looking at whether the Tribe had a tradition of self-government in traffic regulation. It found none. Therefore, the balance of interests tipped in favor of the state. *Id.*, at 702.

Although these three decisions demonstrate that Wisconsin has in the past refused to recognize state jurisdiction for traffic offenses pursuant to Pub.L. 280, a similar conclusion today is unlikely, in light of the Supreme Court's 1987 decision that criminal jurisdiction depends upon whether the conduct at issue violates the State's public policy. *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083.

Although this court would have difficulty recognizing state jurisdiction over traffic infractions should it determine that they are outside the scope of the consent conferred by Pub.L. 280, it must find, based upon the following, that RCW 37.12.010 is a valid assumption of jurisdiction under Pub. L. 280, and that the "decriminalization" of traffic infractions under RCW 46.63 does not constitute a new assertion of jurisdiction.

Analysis of the scope of Pub.L. 280 begins with the distinction between "criminal offenses" and "civil causes of action." The Supreme Court has interpreted Public Law 280's consent to state jurisdiction over "civil causes of action" as being limited to private causes of action, thereby precluding new state regulatory jurisdiction. *Bryan v. Itasca Cy.*, 426 U.S. 373, 384 (1976),[8] *see also, Thomsen v. King County*, 39

---

[8] In *Bryan v. Itasca County*, 426 U.S. 373 (1976) the Supreme Court analyzed the language of Pub. L. 280 and Congress's intent. It held that the consistent and exclusive use of the terms "civil causes of ac-

Wn. App. 505, 509, 946 P.2d 40 (1985). It has recognized that a grant to states of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values, including tribal self-government. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 1088 (1987); *see also Thomsen v. King Cy.*, *supra* at 510. Therefore, when a state seeks to enforce a law within an Indian reservation under the authority of Pub.L. 280, "it must determine whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court." *Cabazon, supra* at 1088. The court went on to approve the Ninth Circuit's distinction[9] between state "criminal/prohibitory" laws and state "civil/regulatory" laws:

(Footnote Continued)

tion "aris[ing] on," "civil law* * *of general application to private persons or private property," and "adjudicat[ion]" in both the Act and its legislative history compelled the conclusion that § 4 was primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting state courts to decide such disputes. *Id. at 383-84.* It concluded by quoting Israel & Smithson, *Indian Taxation, Tribal Sovereignty and Economic Development*, 49 N.D. L. Rev. 267, 396 n. 8 (1973), that "Congress never intended 'civil laws' to mean the entire array of state noncriminal laws, but rather * * * those laws which have to do with private rights and status. Therefore, 'civil laws* * * of general application to private persons or private property' would include the laws of contract, tort, marriage, divorce, insanity, descent, etc., but would not include laws declaring or implementing the states' sovereign powers, such as the power to grant franchises, etc. These are not within the fair meaning of 'private' laws." *Id.* at 384

[9]*See Barona Group of Capitan Grande Band of Mission Indians and Diego Cy. v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929; and *Bryan v. Itasca Cy.*, 426 U.S. 373 (1975).

> if the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation. *The shorthand test is whether the conduct at issue violates the State's public policy.*

Id. (Emphasis added.)

In determining whether a state law is criminal/prohibitory or civil/regulatory, the applicable state laws governing the particular activity must be examined in detail. *Id.* at 1089 n.10. The prohibitory/regulatory distinction is not a bright line rule. *Id.* at 1089. Merely because an otherwise regulatory law is enforceable by criminal as well as civil means does not mean that it is converted into a criminal law within the meaning of Pub.L. 280. *Id.* Nor should the converse be true, that merely because it is "decriminalized" it should be classified as a regulatory law outside the scope of Pub.L. 280.

For example, Washington's fireworks law has been held to be a prohibitory rather than a regulatory law, despite the fact that certain exhibitions of prohibited fireworks are authorized. *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977). The Ninth Circuit distinguished the possession of fireworks from other regulatory schemes such as hunting and fishing, where the person who wishes to hunt or fish merely has to pay a fee and obtain a license.

> "The purpose of such statutes is to regulate the described conduct and to generate revenues. In contrast, the purpose of the fireworks laws is not to generate income, but rather to prohibit their general use and possession in a legitimate effort to promote the safety and health of all citizens."

Id. at 1364. Likewise, a forfeiture proceeding has been held to be quasi-criminal in character, because its object, like criminal proceedings, is to penalize for the commission of an offense against the law. *Quechan Tribe v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976).

Plaintiffs argue that Washington's scheme of traffic infraction enforcement is civil/regulatory in nature and therefore lies outside the scope of Pub.L. 280's consent to state jurisdiction. In support of this argument they cite Opinion of the Attorney General of Washington, 1981, No. 4, which states that any prosecution for violation of a traffic infraction is civil in nature, as are the monetary penalties which may be imposed (Ct. Rec. 5, Ex. E). Violations do not justify a citizen's arrest, since they are neither felonies nor misdemeanors. *Wenatchee v. Durham*, 43 Wn.App. 547, 551 n. 3, 718 P.2d 819 (1986). This is not persuasive, as it focuses on titles and the type of penalty, rather than the recognized test of conduct which violates the state's public policy.

Support for plaintiff's position regarding the regulatory nature of the traffic "infraction" statutes is found in *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978). *Best* involved a defendant charged with drunk driving on an Air Force base. Defendant was sentenced to 10 days in jail, a fine, and a license suspension. The Ninth Circuit reversed the license suspension, holding that the Assimilated Crimes Act incorporated only the criminal laws of California. California case law held that departmental suspensions of licenses were regulatory, not penal, since they were not "punishments" under California law. Therefore, the court determined that the provision of the California Vehicle Code providing for court-ordered suspension of drivers' licenses was also regulatory, not punitive. In reaching this decision, the court cited *Beamon v. Department of Motor Vehicles*, 180 Cal. App.2d 200, 210, 4 Cal. Rptr. 396, 403 (1960):

> The suspension of or revocation of a license is not penal; its purpose is to make the streets and highways safe by protecting the public from incompetence, lack of care, and wilful disregard of the rights of others by drivers. [citations omitted] The fact that petitioner may suffer inconvenience and even economic loss because he has been denied a license does not make the remedial action of the department the imposition of punishment for past offenses.

Id. at 1098-1100.

In light of the more recent Supreme Court decision in *Cabazon*, 107 S.Ct. 1083, and the Ninth Circuit's decision in *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929, this court must find that the *Best* court's analysis is no longer sufficient, since it did not address the public policy concern. *Best* is also distinguishable, in that it involved the Assimilated Crimes Act and state law which specifically identified the license suspension scheme as regulatory.

Plaintiffs argue that it is unnecessary to look beyond the face of the statute to determine whether it is criminal/prohibitory or civil/regulatory, since it clearly states that it is civil. However, both the Supreme Court and the Ninth Circuit have been unwilling to make jurisdictional decisions based upon bald assertions that a statute is criminal or civil. Instead, the court must look closely at the public policy behind the statute, to determine whether the regulated behavior violates that policy. *California v. Cabazon Bank of Indians*, 480 U.S. 202, 94 L.E.2d 244, 107 S.Ct. 1083 (1987); *Barona Group of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert denied*, 461 U.S. 929. Plaintiffs argue that Washington encourages the use of motor vehicles by encouraging tourism and providing highway rest areas, information centers, maps, etc. However, this ignores the clear policy against actions such as speeding, which endanger the public. The fact that driving is not itself against public policy does not support a conclusion that reckless driving, speeding, etc., are not. The intent of traffic infraction laws is to prohibit certain behavior. Such laws therefore fall within the criminal/prohibitory classification of Pub.L. 280. The fact that incarceration is no longer a sanction for certain less serious offenses does not change that conclusion. It is the public policy violation that determines that the conduct is prohibitory in nature.

Plaintiff also argues that if the court does not find Washington's decriminalized traffic code clearly civil, then it is ambiguous and should be construed in favor of the Tribes. Support for this proposition is found in the Supreme

Court's policy in construing Indian treaties and federal statutes which affect tribal sovereignty. The Court has developed special rules of construction of Indian treaties which create a strong presumption that treaty rights have not been abrogated or modified by later federal legislation. Under these rules Congress must show a "clear and plain" intention to abrogate Indian treaty rights. *See Menominee Tribe v. United States*, 391 U.S. 404 (1968) (termination act did not contain an explicit statement abrogating hunting and fishing rights); *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979). Statutes, agreements, and executive orders dealing with Indian affairs have also been construed liberally in favor of establishing Indian rights, and narrowly in favor of retaining Indian rights. Cohen, *Handbook of Federal Indian Law* (1982). *See United States ex rel. Haulpai Indians v. Santa Fe P. R.R.*, 314 U.S. 339 (1941) (Indian title could not be extinguished expect [sic] by a clear and plain expression of intent by Congress); *Bryan v. Itasca Cy.*, 426 U.S. 373 (1976) (Indians' right to be free from state taxation jurisdiction not eliminated by Pub.L. 280); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (Indian Bill of Rights Act strictly construed to limit the availability of federal judicial review of tribal action).

This court does not find Washington's traffic code ambiguous; therefore, plaintiff's argument is not persuasive. It is compelled to find that Washington's traffic "infraction" code is designed to promote the strong public policy of protecting the safety and health of its citizens on public highways. RCW 37.12.010 assumed both "civil" and "criminal" jurisdiction over motor vehicles. The intent of the legislature is clear that it did not intend to focus on labels. Rather, the substance of the law, and the clear public policy concerns underlying it, compel a holding that Washington's traffic laws are within Pub.L. 280's consent to state jurisdiction for offenses committed on public roads.

Jurisdiction on State Highways over Reservations

Under RCW 37.12.010, the state assumed both civil and criminal jurisdiction over Indians and Indian territory

for the operation of motor vehicles upon the public streets, alleys, roads and highways. The question arises whether roads across reservation lands are within the scope of this statute.

Pursuant to 25 U.S.C. § 311, the Secretary of the interior was granted the authority in 1901 to grant permission to State or local authorities for the establishment of public highways through Indian reservations, including allotted lands which had not been conveyed with full power of alienation. Primary State Highway No. 10 appears to have been constructed in accordance with that statute. However, 25 U.S.C. § 311 is not a general grant of jurisdiction to the states over the land constituting the right-of-way. *United States v. Harvey*, 701 F.2d 800, 805 (9th Cir. 1983). Rights of way running through a reservation remain part of the reservation and are within the territorial jurisdiction of the tribal court. *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180 (9th Cir. 1975).[10] However, the state does not claim title to the rights of way. It merely asserts that they are public roads and that therefore vehicles operated on them are

---

[10]Any confusion regarding the status of rights-of way through Indian reservations was cleared up by congress in 1948 when it enacted 18 U.S.C. § 1151 defining Indian country as "all land within the limits of any Indian reservations under the jurisdiction of the United States Government * * * including rights-of-way running through the reservation. Although this statute appears in the federal criminal code, the Supreme Court recognized that the statute's definition also applies to questions of federal civil jurisdiction and to tribal jurisdiction. *DeCoteau v. District Cy. Court*, 420 U.S. 425, 427 n.2 (1975). *See also, State v. Webster*, 338 N.W.2d 474, 479 (Wis. 1983).

subject to concurrent state jurisdiction pursuant to RCW 37.12.010. The Washington State Supreme Court agreed in a similar controversy arising on the Makah reservation. There, the court held that the federal government had reserved to itself the right in its treaty with the Makahs to build roads on reservations where necessary for the public convenience, and the record supported the argument that they were so built; therefore, the state has authority to enforce its civil and criminal laws against members of the tribe on the reservation roads. Such roads are "public highways" within the meaning of RCW 37.11.010(8). *Makah Indian Tribe v. State*, 76 Wn.2d 485, 492-93, 457 P.2d 590 (1969).

In conclusion, this court holds that Washington's traffic infraction statute is prohibitory in nature and therefore comes within Congress's grant of criminal jurisdiction conferred upon the states under Pub.L. 280. Washington's decriminalization of those offenses and the transfer of jurisdiction over them to district and municipal courts does not represent an expansion of jurisdiction requiring the consent of the individual members of the Tribe. The Washington courts therefore have jurisdiction to hear cases involving traffic violations occurring on public roads. This decision is limited to infractions occurring on roads within reservation boundaries which were built wholly or in part with Government funds, and are within the meaning of "public" roads.

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' motion for summary judgment **SHALL BE DENIED**.

2. Defendant's motion for summary judgment **SHALL BE GRANTED.**

3. Plaintiff's motion for preliminary injunction **SHALL BE DENIED AS MOOT.**

4. Plaintiff's complaint and the claims therein **SHALL BE DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 13th day of December, 1988.

JUSTIN D. QUACKENBUSH
UNITED STATES DISTRICT JUDGE

APPENDIX C

STATUTORY PROVISIONS

Pub. L. 280 § 2; 67 Stat. 588 (1953); 18 U.S.C. § 1162:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent

with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

Pub. L. 280 § 4; 67 Stat. 589 (1953); 28 U.S.C. § 1360:

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	*Indian country affected*
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota	All Indian country within the State except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent

with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Pub. L. 280 § 6; 67 Stat. 589 (1953):

Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act. Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Wash. Rev. Code § 37.12.010 (1989):

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further*, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

Wash. Rev. Code § 46.63.020:

Failure to perform any act required or the performance of any act prohibited by this title or an equivalent administrative regulation or local law, ordinance, regulation, or resolution relating to traffic including parking, standing, stopping, and pedestrian offenses, is designated as a traffic infraction and may not be classified as a criminal offense, except for an offense contained in the following provisions of this title or a violation of an equivalent administrative regulation or local law, ordinance, regulation, or resolution:

(1) RCW 46.09.120(2) relating to the operation of a nonhighway vehicle while under the influence of intoxicating liquor or a controlled substance;

* * * *

(10) RCW 46.20.021 relating to driving without a valid driver's license;

* * * *

(12) RCW 46.20.342 relating to driving with a suspended or revoked license;

(13) RCW 46.20.410 relating to the violation of restrictions of an occupational driver's license;

(14) RCW 46.20.416 relating to driving while in a suspended or revoked status;

(15) RCW 46.20.420 relating to the operation of a motor vehicle with a suspended or revoked license;

* * * *

(22) RCW 46.52.010 relating to duty on striking an unattended car or other property;

(23) RCW 46.52.020 relating to duty in case of injury to or death of a person or damage to an attended vehicle;

* * * *

(25) RCW 46.52.100 relating to driving under the influence of liquor or drugs;

* * * *

(33) RCW 46.61.500 relating to reckless driving;

* * * *

(35) RCW 46.61.520 relating to vehicular homicide by motor vehicle;

(36) RCW 46.61.522 relating to vehicular assault;

(37) RCW 46.61.525 relating to negligent driving;

(38) RCW 46.61.530 relating to racing of vehicles on highways;

* * * *

(43) Chapter 46.65 RCW relating to habitual traffic offenders[.]

(2)

No. 91-569

In The

Supreme Court of the United States

October Term, 1991

STATE OF WASHINGTON; WASHINGTON STATE PATROL; GEORGE B. TELLEVIK,

Petitioners,

v.

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION; LAWRENCE FRY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL TAYLOR
Reservation Attorney
Confederated Tribes of the
Colville Reservation
Box 150
Nespelem, Washington 99155
(509) 634-4711
Counsel for Respondents

QUESTION PRESENTED

The Confederated Tribes of the Colville Reservation (Tribes) disagrees with Washington's statement of the question presented. The Tribes believes the issue is:

Whether a state, under the civil jurisdiction provisions of Pub.L. 83-280 is precluded from enforcing a scheme of traffic regulation against tribal Indians driving on their reservation which utilizes only state civil jurisdiction, civil procedure, and civil sanctions; when the tribe has adopted a similar civil scheme of traffic regulation, patrols the reservation with tribal police cfficers, and has given tribal police commissions to enforce tribal law to all municipal, county, and state officers willing to accept such tribal commissions?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I.

STATEMENT OF THE CASE

In 1953 Congress enacted Public Law 83-280, a federal offer for states including Washington to accept jurisdiction over Indian Country. Washington v. Yakima Indian Nation, 439 U.S. 463, 472-73, 499 (1979). Washington asserted criminal traffic jurisdiction over reservation Indians under P.L. 83-280 in 1963. Ibid.; RCW 37.12.010(8).

In 1980, the Washington Legislature decriminalized much of the regulation of traffic utilizing civil jurisdiction, processes, and sanctions to replace the criminal traffic regulation scheme asserted over the Reservation in 1963. Revised Code of Washington (RCW) 46.63.010 - 46.63.151 (**Appendix A**). The Tribes did not consent to the assertion of civil traffic jurisdiction on the Colville Reservation.

The Tribes filed this action on behalf of a tribal member, Lawrence Fry, Sr., itself, and

all its members; to enjoin Washington from asserting civil jurisdiction pursuant to RCW 46.63 over Colville Indians driving on the Reservation.

II.

REASONS TO DENY THE WRIT

A. Not A Case Of National Significance.

The Opinion of the Court of Appeals for the Ninth Circuit in this case, Confederated Tribes of the Colville Reservation v. Washington, 938 F.2d 146 (9th Cir. 1991), involves the interpretation of state civil jurisdiction under P.L. 83-280 in the unusual and specific circumstances where Washington has used state civil jurisdiction, processes, and sanctions to enact a scheme of civil law to regulate driving behavior; where the Tribes has enacted a civil traffic regulation scheme which mirrors that of the state; and where Washington officers have been offered tribal commissions to enforce tribal traffic law on the Reservation. This case does not deal with any statute which the Washington legisla-

ture designated as criminal. This case does not raise issues of national significance.

B. The Ninth Circuit Correctly Applied The Law As Interpreted By This Court.

In 1980, Washington enacted a specific and comprehensive statutory scheme to decriminalize the majority of state traffic offenses. RCW 46.63.010 - RCW 46.63.151 (**Appendix A**). Certain serious offenses, like driving while intoxicated, RCW 46.63.020(1), were exempted from decriminalization and remained subject to state criminal process and sanctions. RCW 46.63.020. The Tribes attacked the authority of Washington to enforce the civil infraction scheme against Colville Indians driving on the Reservation. The Tribes did not attack Washington's enforcement of offenses which retain a criminal designation under Washington law. The Tribes contends that the civil infraction scheme, RCW 46.63, is not enforceable against Colville Indians driving on the Reservation because it is beyond the scope of the civil jurisdiction Washington can receive under P.L. 83-280.

P.L. 83-280 has both a criminal jurisdiction provision, 25 U.S.C. 1321, and a civil jurisdiction provision, 25 U.S.C. 1322 (**Appendix A**). In order to assert its civil jurisdiction over reservation Indians, Washington must show that the civil statute in question is within the scope of the civil jurisdiction offered by P.L. 83-280.

This Court defined the scope of the civil jurisdiction offered by P.L. 83-280 in Bryan v. Itasca County, 462 U.S. 373 (1976). Under P.L. 83-280, states can obtain civil jurisdiction only over civil disputes between private Indian parties arising on the reservation.

> In Bryan v. Itasca County, 426 U.S. 373, 96 S. Ct. 2102, 48 L.Ed.2d 710 (1976), we interpreted §4 to grant statutes jurisdiction over private civil litigation involving reservation Indians in state court, but not to grant general civil regulatory authority. The Minnesota personal property tax at issue in Bryan was unquestionably civil in nature. (emphasis supplied)

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S.Ct. 1083, 1087-1088, 94 L.Ed. 2d 249 (1987).

Because P.L. 83-280 diminishes tribal sovereignty, its provisions are strictly construed in favor of limiting assertions of state jurisdiction to the clearly discernible scope of the statute. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877; 106 S.Ct. 2305, 2311; 90 L.Ed. 2d 881 (1986); Bryan v. Itasca County, 426 U.S. 373, at 392.

Bryan established a bright line test with regard to civil jurisdiction. RCW 46.63 is an exercise of Washington's civil jurisdiction. It is not, however, an exercise of civil jurisdiction over disputes between private Indian parties. RCW 46.63 is, therefore, outside the scope of the civil jurisdiction offered to states by P.L. 83-280.

In adopting the Disposition of Infractions Act, RCW 46.63, it is absolutely clear that Washington intended to utilize its civil jurisdiction. RCW 46.63 contains numerous instructions that its processes and sanctions are to be

considered "decriminalized," "not criminal," or "civil" in nature; RCW §§46.63.010, 46.63.020, 46.63.060(b), 46.63.120(1), 46.63.130. It utilizes all the forms and processes of civil law. Civil process is used rather than arrest. RCW 46.63.060; 46.63.130. No plea is required and a party to an infraction proceeding may be found responsible by default. RCW 46.63.060(2)(a) and (b); RCW 46.63.070(5)(a). No imprisonment may be imposed. RCW 46.64.060(2)(b). Sanctions include only restrictions on licenses and money penalties of not more than $250.00. RCW 46.63.060(2)(b); RCW 46.64.110. No prosecutor is required to appear at any hearing. RCW 46.63.080(3). No jury is permitted. RCW 46.64.090(1). The State may introduce written hearsay evidence. RCW 46.63.090(2). Washington bears only the civil burden of proof, a preponderance of the evidence. RCW 46.63.090(3). Appellate review is discretionary. RCW 46.63.090(5). "Mitigation" hearings, at which witnesses may not be made to

attend by subpoena, are available. RCW 46.63.100(1). All court orders are civil. RCW 46.63.120. Litigants in an infraction proceeding are identified in the statute as "parties"; and the court is prohibited from awarding attorney's fees to either "party" in an infraction case - an unnecessary prohibition, had the legislature regarded the statute as an assertion of criminal jurisdiction. RCW 46.63.151.

The Attorney General of Washington has opined that traffic infractions included in RCW 46.63 are civil matters and that the sanctions are civil.

> ... a traffic infraction (under RCW 46.63) may involve either the violation of a state statute or a local, municipal ordinance. Such a violation however, is no longer a criminal offense. Instead, any resulting prosecution is civil in nature, as are the monetary penalties which may be imposed.

Opinions of the Attorney General of Washington, 1981, No. 4, pg. 2.

Washington courts have unequivocally defined traffic infractions under RCW 46.63 as civil. Kennewick v. Fountain, 802 P.2d 1371,

116 Wn.2d 192 (1991); State v. Long, 705 P.2d 245, 104 Wn. 2d 285 (1985); City of Wenatchee v. Durham, 718 P.2d 819, 822 n.3, 43 Wn.App. 457 (1986).

The academic article explaining Washington's civil, traffic regulation scheme, Hoeman, Washington's Decriminalization of Minor Traffic Offenses, 17 Gonzaga Law Review 609 (1982); depicts an entirely civil law basis for RCW 46.63.

The Ninth Circuit, in the opinion below, recognized that Washington had, by enacting RCW 46.63, changed the basis of its traffic infraction scheme from criminal to civil. The Ninth Circuit discussed numerous civil aspects of Washington's scheme.

> ... because Washington treats speeding as a civil, not a criminal, offense, the officer gave Fry a civil complaint pursuant to RCW Ch. 46.63. (emphasis supplied)

Confederated Tribes of the Colville Reservation v. Washington, 938 F.2d 146 (9th Cir. 1991) at 146.

> We conclude that the State may not declare certain infractions as civil, remove the panoply of constitutional and procedural protections associated with criminal offenses, save itself the time and expense of criminal trials, and then insist the same infraction is criminal for purposes of expanding state jurisdiction and appropriating the revenue raised through enforcement of the speeding laws. (emphasis supplied)

Ibid., at 148.

The Ninth Circuit correctly applied this Court's decisions in Bryan, supra, and Cabazon Band, supra, to find that RCW 46.63 may not be enforced against Colville Indians within the Reservation.

Washington argues that the only difference between Washington's traffic statutes which were in place before 1980 and RCW 46.63 is that the possibility of imprisonment for violation has been removed. There is no support for this position in any Washington authority. In oral argument before the Ninth Circuit, the Court questioned Washington directly as to whether RCW 46.63 had changed only the penalty for traffic infractions from civil to criminal, or whether

the whole system of dealing with traffic infractions in Washington had been converted to a civil enforcement scheme. Washington answered that the whole scheme for dealing with traffic infractions had been changed by RCW 46.63.

In reviewing statutes based on state civil jurisdiction to determine whether they may be imposed on reservation Indians pursuant to the provisions of P.L. 83-280, this Court has held that only those state statutes which provide for the resolution of private civil disputes among reservation Indians are within the scope of the limited civil jurisdiction offered to states by P.L. 83-280. This is the bright line which divides permissible from impermissible assertions of state civil jurisdiction over reservation Indians, and the result of the decision in the Court below is a proper interpretation of that bright line. RCW 46.63 falls outside the scope of civil jurisdiction available to states under P.L. 83-280 and may not be enforced against Colville Indians by Washington.

C. There Is No Conflict Between The Ninth And Seventh Circuit Decisions.

Whether or not the decision of the Seventh Circuit in St. Germain v. Circuit Court of Vilas County, 938 F.2d 75 (7th Cir. 1991), is a correct interpretation of state jurisdiction under P.L. 83-280, the decision is not in conflict with the decision of the Ninth Circuit. The St. Germain Court was dealing with a criminal offense. Ibid. 938 F.2d 75-76, and n.2. "Congress has made it plain that Wisconsin can enforce its criminal laws on the reservation. That is all Wisconsin is doing. This enforcement of Wisconsin driver's license public policy by the imposition of criminal sanctions ..." (emphasis supplied) Ibid. 938 F.2d, 78.

In order to add speed and efficiency to the processing of civil traffic infractions, Washington's traffic infraction statute is based on civil jurisdiction and law. To this end RCW 46.63 avoids any criminal process, stigma, or sanction. The decision of the Ninth Circuit in Confederated Tribes does not interfere with

Washington's prosecution of Indians charged with violation of Washington's criminal traffic statutes, because it deals only with Washington's civil infraction scheme and does not deal with statutes which the Washington legislature intended to be criminal like those considered by the St. Germain Court. The two Circuits are not in conflict.

D. There Is No Void Or Irregularity In Traffic Enforcement On The Colville Indian Reservation.

The Tribes has as strong an interest in maintaining traffic safety on the Colville Reservation for its members and other residents of, and visitors to, the Reservation as does Washington. The record in this case shows that the Tribes, in 1987, adopted a civil traffic infraction statute which mirrors that of Washington, Colville Tribal Code, Title 9.5; that the Tribes employs twenty tribal officers for Reservation patrol; and, that since 1984 the Tribes has offered tribal police commissions to all regular municipal, county, and state offi-

cers patrolling the Reservation so that they can stop and cite Indian traffic offenders and file civil traffic citations in the tribal court. The record shows that municipal and county police officers accepted tribal commissions. State officers refused.

With tribal commissions, all non-Indian officers operating on the Reservation have the requisite authority to stop all motorists, Indian and non-Indian, suspected of violating state and tribal traffic laws. The only difference in treatment of motorists found by an officer to have committed a civil traffic infraction, is that the Indian is cited into the tribal court and the non-Indian is cited into the county court. Traffic enforcement problems, if such exist on the Colville Reservation, result from the refusal of Washington State officers to accept tribal police commissions and to file civil citations in the tribal court.

E. Other Arguments.

Washington appears to argue in its Petition that its civil Disposition of Infractions Act, RCW 46.63, is actually an exercise of criminal jurisdiction. If the Court should consider this argument, the Tribes would argue that state enforcement is barred both because the infractions at issue are civil/regulatory and because the State violated 25 USC §1326 in adopting RCW 46.63.

CONCLUSION

The Court of Appeals ruling presents no conflict, raises no general issue, and properly applies well settled principles of this Court construing P.L. 83-280. In construing RCW 46.63 as a civil statute the ruling upholds all Washington authorities.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Michael Taylor
Counsel of Record
Office of the Reservation Attorney
Confederated Tribes of the Colville Reservation
P.O. Box 150
Nespelem, Washington 99155
(509) 634-4711

Counsel for Respondents

November 5, 1991

APPENDIX A - APPLICABLE STATUTES
CHAPTER 46.63 WASHINGTON REVISED CODE

DISPOSITION OF TRAFFIC INFRACTIONS

Section

46.63.010. Legislative intent

It is the legislative intent in the adoption of this chapter in decriminalization certain traffic offenses to promote the public safety and welfare on public highways and to facilitate the implementation of a uniform and expeditious system for the disposition of traffic infractions.

46.63.020. Violations as traffic infractions - Exceptions

Failure to perform any act required or the performance of any act prohibited by this title or an equivalent administrative regulation or local law, ordinance, regulation, or resolution relating to traffic including parking, standing, stopping, and pedestrian offenses, is designated as a traffic infraction and may not be classified as a criminal offense, except for an offense contained in the following provisions of this title or a violation of an equivalent administrative regulation or local law, ordinance, regulation, or resolution:

(1) RCW 46.09.120(2) relating to the operation of a nonhighway vehicle while under the influence of intoxicating liquor or a controlled substance;

(2) RCW 46.09.130 relating to operation of nonhighway vehicles;

(3) RCW 46.10.090(2) relating to the operation of a snowmobile while under the influence of intoxicating liquor or narcotics or habit-forming drugs or in a manner endangering the person of another;

(4) RCW 46.10.130 relating to the operation of snowmobiles;

(5) Chapter 46.12 RCW relating to certificates of ownership and registration;

(6) RCW 46.16.010 relating to initial registration of motor vehicles;

(7) RCW 46.16.160 relating to vehicle trip permits;

(8) RCW 46.16.011 relating to permitting unauthorized persons to drive;

(9) RCW 46.16.381(8) relating to unauthorized acquisition of a special decal, license plate, or card for disabled persons' parking;

(10) RCW 46.20.021 relating to driving without a valid driver's license;

(11) RCW 46.20.336 relating to the unlawful possession and use of a driver's license;

(12) RCW 46.20.342 relating to driving with a suspended or revoked license;

(13) RCW 46.20.410 relating to the violation of restrictions of an occupational driver's license;

(14) RCW 46.20.416 relating to driving while in a suspended or revoked status;

(15) RCW 46.20.420 relating to the operation of a motor vehicle with a suspended or revoked license;

(16) RCW 46.20.750 relating to assisting another person to start a vehicle equipped with an ignition interlock device;

(17) Chapter 46.29 RCW relating to financial responsibility;

(18) RCW 46.44.180 relating to operation of mobile home pilot vehicles;

(19) RCW 46.48.175 relating to the transportation of dangerous articles;

(20) RCW 46.52.010 relating to duty on striking an unattended car or other property;

(21) RCW 46.52.020 relating to duty in case of injury to or death of a person or damage to an attended vehicle;

(22) RCW 46.52.090 relating to reports by repairmen, storagemen, and appraisers;

(23) RCW 46.52.100 relating to driving under the influence of liquor or drugs;

(24) RCW 46.52.130 relating to confidentiality of the driving record to be furnished to an insurance company, an employer, and an alcohol/drug assessment or treatment agency;

(25) RCW 46.55.020 relating to engaging in the activities of a registered tow truck operator without a registration certificate;

(26) RCW 46.61.015 relating to obedience to police officers, flagmen, or fire fighters;

(27) RCW 46.61.020 relating to refusal to give information to or cooperate with an officer;

(28) RCW 46.61.022 relating to failure to stop and give identification to an officer;

(29) RCW 46.61.024 relating to attempting to elude pursuing policy vehicles;

(30) RCW 46.61.500 relating to reckless driving;

(31) RCW 46.61.502 and 46.61.504 relating to persons under the influence of intoxicating liquor or drugs;

(32) RCW 46.61.520 relating to vehicular homicide by motor vehicle;

(33) RCW 46.61.522 relating to vehicular assault;

(34) RCW 46.61.525 relating to negligent driving;

(35) RCW 46.61.530 relating to racing of vehicles on highways;

(36) RCW 46.61.685 relating to leaving children in an unattended vehicle with the motor running;

(37) RCW 46.64.010 relating to unlawful cancellation of or attempt to cancel a traffic citation;

(38) RCW 46.64.020 relating to nonappearance after a written promise;

(39) RCW 46.64.048 relating to attempting, aiding, abetting, coercing, and committing crimes;

(40) Chapter 46.65 RCW relating to habitual traffic offenders;

(41) Chapter 46.70 RCW relating to unfair motor vehicle business practices, except where that chapter provides for the assessment of monetary penalties of a civil nature;

(42) Chapter 46.72 RCW relating to the transportation of passengers in for hire vehicles;

(43) Chapter 46.80 RCW relating to motor vehicle wreckers;

(44) Chapter 46.82 RCW relating to driver's training schools;

(45) RCW 46.87.260 relating to alteration or forgery of a cab card, letter of authority, or other temporary authority issued under chapter 46.87 RCW;

(46) RCW 46.87.290 relating to operation of an unregistered or unlicensed vehicle under chapter 46.87 RCW.

46.63.030. Notice of traffic infraction - Issuance

(1) A law enforcement officer has the authority to issue a notice of traffic infraction:

(a) When the infraction is committed in the officer's presence;

(b) When the officer is acting upon the request of a law enforcement officer in whose presence the traffic infraction was committed; or

(c) If an officer investigating at the scene of a motor vehicle accident has reasonable cause to believe that the driver of a motor vehicle involved in the accident has committed a traffic infraction.

(2) A court may issue a notice of traffic infraction upon receipt of a written statement of the officer that there is reasonable cause to believe that an infraction was committed.

(3) If any motor vehicle without a driver is found parked, standing, or stopped in violation of this title or an equivalent administrative regulation or local law, ordinance, regula-

tion, or resolution, the officer finding the vehicle shall take its registration number and may take any other information displayed on the vehicle which may identify its user, and shall conspicuously affix to the vehicle a notice of traffic infraction.

46.63.060. Notice of infraction - Determination final unless contested - Form

(1) A notice of traffic infraction represents a determination that an infraction has been committed. The determination will be final unless contested as provided in this chapter.

(2) The form for the notice of traffic infraction shall be prescribed by rule of the supreme court and shall include the following:

(a) A statement that the notice represents a determination that a traffic infraction has been committed by the person named in the notice and that the determination shall be final unless contested as provided in this chapter;

(b) A statement that a traffic infraction is a noncriminal offense for which imprisonment may not be imposed as a sanction; that the penalty for a traffic infraction may include sanctions against the person's driver's license including suspension, revocation, or denial; that the penalty for a traffic infraction related to standing, stopping, or parking may include nonrenewal of the vehicle license;

(c) A statement of the specific traffic infraction for which the notice was issued;

(d) A statement of the monetary penalty established for the traffic infraction;

(e) A statement of the options provided in this chapter for responding to the notice and the procedures necessary to exercise these options;

(f) A statement that any hearing to contest the determination the state has the

burden of proving, by a preponderance of the evidence, that the infraction was committed; and that the person may subpoena witnesses including the officer who issued the notice of infraction;

(g) A statement that at any hearing requested for the purpose of explaining mitigating circumstances surrounding the commission of the infraction the person will be deemed to have committed the infraction and may not subpoena witnesses;

(h) A statement that the person must respond to the notice as provided in this chapter within fifteen days or the person's driver's license will not be renewed by the department until any penalties imposed pursuant to this chapter have been satisfied;

(i) A statement that failure to appear at a hearing requested for the purpose of contesting the determination or for the purpose of explaining mitigating circumstances will result in the refusal of the department to renew the person's driver's license, or in the case of a standing, stopping, or parking violation the vehicle license, until any penalties imposed pursuant to this chapter have been satisfied;

(j) A statement, which the person shall sign, that the person promises to respond to the notice of infraction in one of the ways provided in this chapter;

(k) A statement that failure to respond to a notice of infraction as promised is a misdemeanor and may be punished by a fine or imprisonment in jail.

46.63.070. Response to notice of traffic infraction - Contesting determination - Hearing - Failure to respond or appear

(1) Any person who receives a notice of traffic infraction shall respond to such notice as provided in this section within fifteen days of the date of the notice.

(2) If the person determined to have committed the infraction does not contest the determination the person shall respond by completing the appropriate portion of the notice of infraction and submitting it, either by mail or in person, to the court specified on the notice. A check or money order in the amount of the penalty prescribed for the infraction must be submitted with the response. When a response which does not contest the determination is received, an appropriate order shall be entered in the court's records, and a record of the response and order shall be furnished to the department in accordance with RCW 46.20.270.

(3) If the person determined to have committed the infraction wishes to contest the determination the person shall respond by completing the portion of the notice of infraction requesting a hearing and submitting it, either by mail or in person, to the court specified on the notice. The court shall notify the person in writing of the time, place, and date of the hearing, and that date shall not be sooner than seven days from the date of the notice, except by agreement.

(4) If the person determined to have committed the infraction does not contest the determination but wishes to explain mitigating circumstances surrounding the infraction the person shall respond by completing the portion of the notice of infraction requesting a hearing for that purpose and submitting it, either by mail or in person, to the court specified on the notice. The court shall notify the person in writing of the time, place, and date of the hearing.

(5)(a) If any person issued a notice of traffic infraction:

(i) Fails to respond to the notice of traffic infraction as provided in subsection (2) of this section; or

(ii) Fails to appear at a hearing requested pursuant to subsection (3) or (4) of this section;

the court shall enter an appropriate order assessing the monetary penalty prescribed for the traffic infraction and any other penalty authorized by this chapter and shall notify the department in accordance with RCW 46.20.270, of the failure to respond to the notice of infraction or to appear at a requested hearing.

(b) The department may not renew the driver's license, or in the case of a standing, stopping, or parking violation the vehicle license, of any person for whom the court has entered an order pursuant to (a) of this subsection until any penalties imposed pursuant to this chapter have been satisfied. For purposes of driver's license nonrenewal only, the lessee of a vehicle shall be considered to be the person to whom a notice of a standing, stopping, or parking violation has been issued for such violations of the vehicle incurred while in the vehicle was leased or rented under a bona fide business of leasing vehicles and a lessee who is not the vehicle's registered owner, if the lease agreement contains a provision prohibiting anyone other than the lessee from operating the vehicle. Such a lessor shall, upon the request of the municipality issuing the notice of infraction, supply the municipality with the name and driver's license number of the person leasing the vehicle at the time of the infraction.

46.63.080. Hearings - Rules of procedure - Counsel

(1) Procedures for the conduct of all hearings provided for in this chapter may be established by rule of the supreme court.

(2) Any person subject to proceedings under this chapter may be represented by counsel.

(3) The attorney representing the state, county, city, or town may appear in any proceedings under this chapter but need not appear,

notwithstanding any statute or rule of court to the contrary.

46.63.090. Hearings - Contesting determination that infraction committed - Appeal

(1) A hearing held for the purpose of contesting the determination that an infraction has been committed shall be without a jury.

(2) The court may consider the notice of traffic infraction and any other written report made under oath submitted by the officer who issued the notice or whose written statement was the basis for the issuance of the notice in lieu of the officer's personal appearance at the hearing. The person named in the notice may subpoena witnesses, including the officer, and has the right to present evidence and examine witnesses present in court.

(3) The burden of proof is upon the state to establish the commission of the infraction by a preponderance of the evidence.

(4) After consideration of the evidence and argument the court shall determine whether the infraction was committed. Where it has not been established that the infraction was committed an order dismissing the notice shall be entered in the court's records. Where it has been established that the infraction was committed an appropriate order shall be entered in the court's records. A record of the court's determination and order shall be furnished to the department in accordance with RCW 46.20.270 as now or hereafter amended.

(5) An appeal from the court's determination or order shall be to the superior court. The decision of the superior court is subject only to discretionary review pursuant to Rule 2.3 of the Rules of Appellate Procedure.

46.63.100. Hearings - Explanation of mitigating circumstances

(1) A hearing held for the purpose of allowing a person to explain mitigating circumstances surrounding the commission of an infraction shall be an informal proceeding. The person may not subpoena witnesses. The determination that an infraction has been committed may not be contested at a hearing held for the purpose of explaining mitigating circumstances.

(2) After the court has heard the explanation of the circumstances surrounding the commission of the infraction an appropriate order shall be entered in the court's records. A record of the court's determination and order shall be furnished to the department in accordance with RCW 46.20.270 as now or hereafter amended.

(3) There may be no appeal from the court's determination or order.

46.63.110. Monetary penalties

(1) A person found to have committed a traffic infraction shall be assessed a monetary penalty. No penalty may exceed two hundred and fifty dollars for each offense unless authorized by this chapter or title.

(2) The supreme court shall prescribe by rule a schedule of monetary penalties for designated traffic infractions. This rule shall also specify the conditions under which local courts may exercise discretion in assessing fines and penalties for traffic infractions. The legislature respectfully requests the supreme court to adjust this schedule every two years for inflation.

(3) There shall be a penalty of twenty-five dollars for failure to respond to a notice of traffic infraction except where the infraction relates to parking as defined by local law, ordinance, regulation, or resolution or failure to pay a monetary penalty imposed pursuant to

this chapter. A local legislative body may set a monetary penalty not to exceed twenty-five dollars for failure to respond to a notice of traffic infraction relating to parking as defined by local law, ordinance, regulation, or resolution. The local court, whether a municipal, police, or district court, shall impose the monetary penalty set by the local legislative body.

(4) Monetary penalties provided for in chapter 46.70 RCW which are civil in nature and penalties which may be assessed for violations of chapter 46.44 RCW relating to size, weight, and load of motor vehicles are not subject to the limitation on the amount of monetary penalties which may be imposed pursuant to this chapter.

(5) Whenever a monetary penalty is imposed by a court under this chapter it is immediately payable. If the person is unable to pay at that time the court may, in its discretion, grant an extension of the period in which the penalty may be paid. If the penalty is not paid on or before the time established for payment the court shall notify the department of the failure to pay the penalty, and the department may not renew the person's driver's license until the penalty has been paid and the penalty provided in subsection (3) of this section has been paid.

46.63.120. Order of court - Civil nature - Waiver, reduction, suspension of penalty - Community service in lieu of penalty

(1) An order entered after the receipt of a response which does not contest the determination, or after it has been established at a hearing that the infraction was committed, or after a hearing for the purpose of explaining mitigating circumstances is civil in nature.

(2) The court may include in the order the imposition of any penalty authorized by the provisions of this chapter for the commission of

an infraction. The court may, in its discretion, waive, reduce, or suspend the monetary penalty prescribed for the infraction. At the person's request the court may order performance of a number of hours of community service in lieu of a monetary penalty, at the rate of the then state minimum wage per hour.

46.63.130. Issue of process by court of limited jurisdiction

Notwithstanding any other provisions of law governing service of process in civil cases, a court of limited jurisdiction having jurisdiction over an alleged traffic infraction may issue process anywhere within the state.

46.63.140. Presumption regarding stopped, standing, or parked vehicles

(1) In any traffic infraction case involving a violation of this title or equivalent administrative regulation or local law, ordinance, regulations, or resolution relating to the stopping, standing, or parking of a vehicle, proof that the particular vehicle described in the notice of traffic infraction was stopping, standing, or parking in violation of any such provision of this title or an equivalent administrative regulation or local law, ordinance, regulation, or resolution, together with proof that the person named in the notice of traffic infraction was at the time of the violation the registered owner of the vehicle, shall constitute in evidence a prima facie presumption that the registered owner of the vehicle was the person who parked or placed the vehicle at the point where, and for the time during which, the violation occurred.

(2) The foregoing stated presumption shall apply only when the procedure prescribed in RCW 46.63.030(3) has been followed.

46.63.150. Costs and attorney's fees

(1) The court may suspend either a portion or all of the costs of the action except amounts paid for allocation to the payment of costs associated with the judicial information system.

(2) The court may not award attorney's fees or costs to the defendant in a traffic infraction case.

46.63.151. Costs and attorney fees

Each party to a traffic infraction case is responsible for costs incurred by that party. No costs or attorney fees may be awarded to either party in a traffic infraction case.

P.L. LAW 83-280

25 U.S.C. § 1322. Assumption by State of civil jurisdiction

(a) Consent of United States; force and effect of civil laws

The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

NO. 91-569

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF WASHINGTON;
WASHINGTON STATE PATROL;
GEORGE B. TELLEVIK,

Petitioners,

v.

CONFEDERATED TRIBES OF
THE COLVILLE RESERVATION;
LAWRENCE FRY,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH O. EIKENBERRY
Attorney General
State of Washington

EDWARD B. MACKIE
Chief Deputy Attorneys General
Counsel of Record

WILLIAM BERGGREN COLLINS
Assistant Attorney General

Attorneys for Petitioners

7th Floor, Highways-Licenses Bldg.
Mail Stop: PB-71
Olympia, Washington 98504
(206) 753-6207

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

NO. 91-569

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF WASHINGTON;
WASHINGTON STATE PATROL;
GEORGE B. TELLEVIK,

Petitioners,

v.

CONFEDERATED TRIBES OF
THE COLVILLE RESERVATION;
LAWRENCE FRY,

Respondents.

THE RESPONDENTS' QUESTION PRESENTED MISCHARACTERIZES THE ISSUE

The Question Presented by the tribes is essentially whether a unilateral tribal action--adopting tribal traffic ordinances enforced by tribal police--can preempt the state

from exercising jurisdiction within a reservation.[1] This question is not presented in this case. Such a ruling below would clearly present a major question of national significance. Despite the significance of the question presented by the tribes, we cannot concur in their characterization of the circuit court's ruling.

---

[1] Respondents' Question Presented states:

"Whether a state, under the civil jurisdiction provisions of Pub. L. 83-280 is precluded from enforcing a scheme of traffic regulation against tribal Indians driving on their reservation which utilizes only state civil jurisdiction, civil procedure, and civil sanctions; when the tribe has adopted a similar civil scheme of traffic regulation, patrols the reservation with tribal police officers, and is given tribal police commissions to enforce tribal law to all municipal, county and state officers willing to accept such tribal commissions?"

Resp. Br. at i (emphasis added).

The tribes' characterization and discussion of the Question Presented is clearly intended to convey the impression that the circuit court's invalidation of long standing state jurisdiction does not create a jurisdictional void. The tribes' attempt to convey the impression that there would be traffic standards in effect. And further that those standards would be equally enforced for tribal members on public highways under tribal restrictions in the same manner as the state standards are enforced for non-tribal members on those public highways. But that assertion has no basis in the Ninth Circuit decision.

The Ninth Circuit concluded that the state lacks jurisdiction vis-a-vis tribal members on public highways within a reservation without any consideration

of whether a tribe does or does not promulgate or enforce traffic safety restrictions for tribal members.[2] The decision does not require that tribal standards, even if imposed, be consistent with traffic safety standards imposed by the state upon non-tribal members utilizing those public highways.

The decision rendered by the circuit court would be equally applicable to all of the twenty-four Indian reservations within the State of

---

[2] The circuit court's only comment about tribal enforcement was:

"Indian sovereignty and the state's interest in discouraging speeding are both served by our decision here: the Tribes have enacted a traffic code, employ trained police officers, and maintain tribal courts staffed by qualified personnel to deal with criminal traffic violations."

Confederated Tribes of the Colville Reservation v. Washington, 938 F.2d 146, 149 (1991). This statement does not constitute a holding of the case.

Washington, without respect to whether the tribal authorities choose or do not choose to enact tribal highway safety codes. Nor would any consideration be given as to whether such tribal ordinances if enacted were enforced.

The actual holding of the circuit court was that there was no state jurisdiction pursuant to Pub. L. 83-280 § 2 (18 U.S.C. § 1162). The circuit court established a per se rule that if an offense does not include the legal possibility of imprisonment, the law cannot be enforced against a tribal member on the reservation. The circuit court's departure from the analysis of the state's policy and the tribal interest required by California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) presents an important

question that should be reviewed by this Court.

THE STATE'S ASSUMPTION OF JURISDICTION UNDER PUB. L. 83-280 WAS NOT LIMITED TO CRIMINAL TRAFFIC OFFENSES

The tribes' Statement of the Case states that "Washington asserted criminal traffic jurisdiction over reservation Indians under PL 83-280 in 1963", Resp. Br. at 1. This statement is misleading for the state's assumption of jurisdiction was not limited to "criminal traffic jurisdiction".

The 1963 act, which is quoted in the Petition, Appendix C-3, (Wash. Rev. Code § 37.12.010), recites that the state obligates "itself to assume criminal and civil jurisdiction over Indians . . ." except "Indians when on their tribal lands are allotted lands within an established Indian reservation . . .." The statute further provides

that the exception from state jurisdiction for Indians on tribal lands does not apply to "[o]peration of motor vehicles upon the public streets, alleys, roads and highways. . .."

Thus, state jurisdiction statute implementing Pub. L. 83-280 was not, as asserted by the tribes, confined to criminal traffic offenses.

THIS CASE CONCERNS CRIMINAL JURISDICTION UNDER § 2 OF PUB. L. 83-280 NOT CIVIL JURISDICTION UNDER § 4

The tribes urge the Court to dismiss this Petition because the law is well settled. The tribes point to the bright line test established in Bryan v. Itasca Cy, 426 U.S. 373 (1976) that civil jurisdiction under § 4 of Pub. L. 83-280 (28 U.S.C. § 1360) only applies to disputes between private Indian parties. Pet. at 5.

This case is not about civil jurisdiction under § 4. The case concerns jurisdiction pursuant to § 2. Below, all parties agreed that this is a § 2 case. The circuit court recognized this fact, stating:

> Both the Tribes and State agree the dispute in this instance is not within the purview of section 4. Rather, the issue is whether or not Washington law relating to speeding should be classified as either criminal/prohibitory or civil regulatory.

938 F.2d at 147. Pet. A-5.

The circuit court ruled that if an offense did not include the legal possibility of imprisonment there was no jurisdiction under § 2. There is no authority for this per se rule. The circuit court cited none and neither do the tribes. The test established by this Court in Cabazon calls for

analyzing the state's policy and the tribal interest.

This case presents clearly and directly the question of whether there should be a per se rule. As we pointed out in our Petition, the state's policy and interest in safety on the public highway present a compelling case for criminal/prohibitory jurisdiction under § 2. Pet. 8-10.

Indeed, although they do not carry the legal possibility of imprisonment, traffic infractions under Washington law are not typical "civil proceedings". Such proceedings can only be commenced by a police officer, not by private citizens. Wash. Rev. Code § 46.63.030(1), (2). A failure to respond to the citation is a criminal offense. Wash. Rev. Code 46.63.060(2)(k). A failure to respond places an automatic

bar to the renewal of the driver license. Wash. Rev. Code 46.63.070(5), 46.63.060(2)(h).

The tribes apparently recognize that the circuit court has applied a per se rule. Their entire civil focus is based on the premise that there is no legal possibility of imprisonment for a traffic infraction. The tribes do not attempt to support the decision below based on the tests set out in Cabazon. The question of whether the tests in Cabazon should be set aside in favor of a per se rule should be resolved by this Court.

THE REASONING OF THE CIRCUIT COURT CREATES A CONFLICT BETWEEN THE NINTH AND SEVENTH CIRCUITS

In our Petition we urged this Court to accept this case to resolve a conflict between the Ninth Circuit's decision below and St. Germaine v.

Circuit Court of Vilas Cy, 938 F.2d 75 (7th Cir. 1991). The tribes attempt to reconcile the decisions by pointing out that St. Germaine involved the legal possibility of imprisonment and the decision below does not.

The problem with this argument is that it ignores the alternate holding in Part II of the decision below. As we pointed out in our Petition, the circuit12H court's reasoning in Part II could prohibit Washington from enforcing its law even if the legal possibility of imprisonment existed. Petition at 10-12.

In addition on November 11, 1991 Steven K. St. Germaine filed a Petition for a Writ of Certiorari with this Court to obtain review of the Seventh Circuit's decision in St. Germaine. Mr. St. Germaine is an enrolled member

of the Lac du Flambeau Band of Lake Superior Chippewa Indians who is challenging Wisconsin jurisdiction under § 2 of Pub. L. 83-280 It is our understanding that Mr. St. Germaine is also asking this Court to resolve the conflict between the Ninth and Seventh Circuit decisions.

CONCLUSION

For these reasons we respectfully request the the writ be granted.

DATED this 13th day of November, 1991.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

EDWARD B. MACKIE
Chief Deputy Attorney General
Counsel of Record

WILLIAM BERGGREN COLLINS
Assistant Attorney General

(4)

NO. 91-569

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF WASHINGTON;
WASHINGTON STATE PATROL;
GEORGE B. TELLEVIK,

Petitioners,

v.

CONFEDERATED TRIBES OF
THE COLVILLE RESERVATION;
LAWRENCE FRY,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH O. EIKENBERRY
Attorney General
State of Washington

EDWARD B. MACKIE
Chief Deputy Attorneys General
Counsel of Record

WILLIAM BERGGREN COLLINS
Assistant Attorney General

Attorneys for Petitioners

7th Floor, Highways-Licenses Bldg.
Mail Stop: PB-71
Olympia, Washington 98504
(206) 753-6207

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

NO. 91-569

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF WASHINGTON;
WASHINGTON STATE PATROL;
GEORGE B. TELLEVIK,

Petitioners,

v.

CONFEDERATED TRIBES OF
THE COLVILLE RESERVATION;
LAWRENCE FRY,

Respondents.

THE RESPONDENTS' QUESTION PRESENTED MISCHARACTERIZES THE ISSUE

The Question Presented by the tribes is essentially whether a unilateral tribal action--adopting tribal traffic ordinances enforced by tribal police--can preempt the state

from exercising jurisdiction within a reservation.[1] This question is not presented in this case. Such a ruling below would clearly present a major question of national significance. Despite the significance of the question presented by the tribes, we cannot concur in their characterization of the circuit court's ruling.

---

[1] Respondents' Question Presented states:

"Whether a state, under the civil jurisdiction provisions of Pub. L. 83-280 is precluded from enforcing a scheme of traffic regulation against tribal Indians driving on their reservation which utilizes only state civil jurisdiction, civil procedure, and civil sanctions; when the tribe has adopted a similar civil scheme of traffic regulation, patrols the reservation with tribal police officers, and is given tribal police commissions to enforce tribal law to all municipal, county and state officers willing to accept such tribal commissions?"

Resp. Br. at i (emphasis added).

The tribes' characterization and discussion of the Question Presented is clearly intended to convey the impression that the circuit court's invalidation of long standing state jurisdiction does not create a jurisdictional void. The tribes' attempt to convey the impression that there would be traffic standards in effect. And further that those standards would be equally enforced for tribal members on public highways under tribal restrictions in the same manner as the state standards are enforced for non-tribal members on those public highways. But that assertion has no basis in the Ninth Circuit decision.

The Ninth Circuit concluded that the state lacks jurisdiction vis-a-vis tribal members on public highways within a reservation without any consideration

of whether a tribe does or does not promulgate or enforce traffic safety restrictions for tribal members.[2] The decision does not require that tribal standards, even if imposed, be consistent with traffic safety standards imposed by the state upon non-tribal members utilizing those public highways.

The decision rendered by the circuit court would be equally applicable to all of the twenty-four Indian reservations within the State of

---

[2] The circuit court's only comment about tribal enforcement was:

"Indian sovereignty and the state's interest in discouraging speeding are both served by our decision here: the Tribes have enacted a traffic code, employ trained police officers, and maintain tribal courts staffed by qualified personnel to deal with criminal traffic violations."

Confederated Tribes of the Colville Reservation v. Washington, 938 F.2d 146, 149 (1991). This statement does not constitute a holding of the case.

Washington, without respect to whether the tribal authorities choose or do not choose to enact tribal highway safety codes. Nor would any consideration be given as to whether such tribal ordinances if enacted were enforced.

The actual holding of the circuit court was that there was no state jurisdiction pursuant to Pub. L. 83-280 § 2 (18 U.S.C. § 1162) The circuit court established a per se rule that if an offense does not include the legal possibility of imprisonment, the law cannot be enforced against a tribal member on the reservation. The circuit court's departure from the analysis of the state's policy and the tribal interest required by California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) presents an important

question that should be reviewed by this Court.

THE STATE'S ASSUMPTION OF JURISDICTION UNDER PUB. L. 83-280 WAS NOT LIMITED TO CRIMINAL TRAFFIC OFFENSES

The tribes' Statement of the Case states that "Washington asserted criminal traffic jurisdiction over reservation Indians under PL 83-280 in 1963", Resp. Br. at 1. This statement is misleading for the state's assumption of jurisdiction was not limited to "criminal traffic jurisdiction".

The 1963 act, which is quoted in the Petition, Appendix C-3, (Wash. Rev. Code § 37.12.010), recites that the state obligates "itself to assume criminal and civil jurisdiction over Indians . . ." except "Indians when on their tribal lands are allotted lands within an established Indian reservation . . .." The statute further provides

that the exception from state jurisdiction for Indians on tribal lands does not apply to "[o]peration of motor vehicles upon the public streets, alleys, roads and highways. . . ."

Thus, state jurisdiction statute implementing Pub. L. 83-280 was not, as asserted by the tribes, confined to criminal traffic offenses.

THIS CASE CONCERNS CRIMINAL JURISDICTION UNDER § 2 OF PUB. L. 83-280 NOT CIVIL JURISDICTION UNDER § 4

The tribes urge the Court to dismiss this Petition because the law is well settled. The tribes point to the bright line test established in Bryan v. Itasca Cy, 426 U.S. 373 (1976) that civil jurisdiction under § 4 of Pub. L. 83-280 (28 U.S.C. § 1360) only applies to disputes between private Indian parties. Pet. at 5.

This case is not about civil jurisdiction under § 4. The case concerns jurisdiction pursuant to § 2. Below, all parties agreed that this is a § 2 case. The circuit court recognized this fact, stating:

> Both the Tribes and State agree the dispute in this instance is not within the purview of section 4. Rather, the issue is whether or not Washington law relating to speeding should be classified as either criminal/prohibitory or civil regulatory.

938 F.2d at 147. Pet. A-5.

The circuit court ruled that if an offense did not include the legal possibility of imprisonment there was no jurisdiction under § 2. There is no authority for this per se rule. The circuit court cited none and neither do the tribes. The test established by this Court in Cabazon calls for

analyzing the state's policy and the tribal interest.

This case presents clearly and directly the question of whether there should be a per se rule. As we pointed out in our Petition, the state's policy and interest in safety on the public highway present a compelling case for criminal/prohibitory jurisdiction under § 2. Pet. 8-10.

Indeed, although they do not carry the legal possibility of imprisonment, traffic infractions under Washington law are not typical "civil proceedings". Such proceedings can only be commenced by a police officer, not by private citizens. Wash. Rev. Code § 46.63.030(1), (2). A failure to respond to the citation is a criminal offense. Wash. Rev. Code 46.63.060(2)(k). A failure to respond places an automatic

bar to the renewal of the driver license. Wash. Rev. Code 46.63.070(5), 46.63.060(2)(h).

The tribes apparently recognize that the circuit court has applied a per se rule. Their entire civil focus is based on the premise that there is no legal possibility of imprisonment for a traffic infraction. The tribes do not attempt to support the decision below based on the tests set out in Cabazon. The question of whether the tests in Cabazon should be set aside in favor of a per se rule should be resolved by this Court.

THE REASONING OF THE CIRCUIT COURT CREATES A CONFLICT BETWEEN THE NINTH AND SEVENTH CIRCUITS

In our Petition we urged this Court to accept this case to resolve a conflict between the Ninth Circuit's decision below and St. Germaine v.

Circuit Court of Vilas Cy, 938 F.2d 75 (7th Cir. 1991). The tribes attempt to reconcile the decisions by pointing out that St. Germaine involved the legal possibility of imprisonment and the decision below does not.

The problem with this argument is that it ignores the alternate holding in Part II of the decision below. As we pointed out in our Petition, the circuit court's reasoning in Part II could prohibit Washington from enforcing its law even if the legal possibility of imprisonment existed. Petition at 10-12.

In addition on November 11, 1991 Steven K. St. Germaine filed a Petition for a Writ of Certiorari with this Court to obtain review of the Seventh Circuit's decision in St. Germaine. Mr. St. Germaine is an enrolled member

of the Lac du Flambeau Band of Lake Superior Chippewa Indians who is challenging Wisconsin jurisdiction under § 2 of Pub. L. 83-280 It is our understanding that Mr. St. Germaine is also asking this Court to resolve the conflict between the Ninth and Seventh Circuit decisions.

CONCLUSION

For these reasons we respectfully request the the writ be granted.

DATED this 13th day of November, 1991.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

EDWARD B. MACKIE
Chief Deputy Attorney General
Counsel of Record

WILLIAM BERGGREN COLLINS
Assistant Attorney General

No. 91-569

In the Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF WASHINGTON, ET AL., PETITIONERS

v.

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

ROBERT L. KLARQUIST
JACQUES B. GELIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the grant of criminal jurisdiction set forth in the Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (commonly known as Public Law 280), permits a State to enforce its civil laws prohibiting speeding and other motor vehicle infractions against Indians on an Indian reservation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-569

STATE OF WASHINGTON, ET AL., PETITIONERS

v.

CONFEDERATED TRIBES OF THE
COLVILLE RESERVATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. In 1953, in response to the "problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement," *Bryan* v. *Itasca County*, 426 U.S. 373, 379 (1976), Congress passed the Act of Aug. 15, 1953, ch. 505 (Pub. L. No. 83-280), 67 Stat. 588, commonly known as Public Law 280. The first five sections of Public Law 280 automatically ceded criminal and civil jurisdiction over matters involving Indians in Indian country (with exceptions for certain specified reserva-

tions) to five named States, which did not include Washington. 67 Stat. 588-590. In particular, Section 2 ceded jurisdiction over criminal matters,[1] and Section 4 ceded jurisdiction over civil matters.[2] 67 Stat. 588-589. Sections 6 and 7 granted all other States the option of assuming similar jurisdiction. 67 Stat. 590; see generally *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 471-474 (1979).

2. Washington first acted to acquire jurisdiction under Public Law 280 in 1957, when it enacted a statute providing for the general assumption of criminal and civil jurisdiction over Indian country, upon the request of any tribe. Ch. 240, 1957 Wash. Laws 941-942. In 1963, Washington revised that statute in two respects: first, to provide for assumption of jurisdiction without tribal consent, and second, to limit the jurisdiction over Indians on tribal or allotted lands to eight specified subjects, including "[o]peration of motor vehicles upon the public streets, alleys, roads and highways." Ch. 36, § 1, 1963 Wash. Laws 347 (codified at Wash. Rev. Code Ann. § 37.12.010 (1991).[3]

---

[1] For discussion of the limits on the jurisdiction granted by Section 2, see *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 207-212 (1987) (holding that a California gambling statute that provided for criminal penalties did not fall within the grant of criminal jurisdiction set forth in Section 2).

[2] For discussion of the limits on the jurisdiction granted by Section 4, see *Bryan* v. *Itasca County*, 426 U.S. 373, 381-393 (1976) (holding that the jurisdictional grant in Section 4 did not include the power to impose taxes).

[3] This Court upheld the validity of Washington's 1963 assumption of jurisdiction against various challenges in *Wash-*

3. In 1979, Washington's legislature decriminalized much of its motor vehicle code, "to promote the public safety and welfare on public highways and to facilitate the implementation of a uniform and expeditious system for the disposition of traffic infractions." Ch. 136, § 1, 1979 Wash. Laws 1418 (1st Ex. Sess.), codified at Wash. Rev. Code Ann. § 46.63.010 (1991). Section 46.63.020 provides that, except for various specifically listed offenses (such as reckless driving or driving while intoxicated), no failure to comply with any provision of the State's motor vehicle code shall "be classified as a criminal offense," but instead shall be "designated as a traffic infraction." Title 46 does not provide for imprisonment for traffic infractions, and the maximum penalty generally is a monetary assessment of $250. § 46.63.110(1). If a

---

ington v. *Confederated Bands & Tribes of The Yakima Indian Nation*, 439 U.S. at 476-499.

Section 5 of the 1963 Act also provided that, upon request of the tribe, the State would assume not only the limited mandatory jurisdiction described in Section 37.12.010, but full jurisdiction throughout Indian country. 1963 Wash. Laws 348-349, codified at Wash. Rev. Code Ann. § 37.12.021 (1991). Respondent Confederated Tribes of the Colville Reservation made an election under Section 37.12.021, effective January 29, 1965. See *Tonasket* v. *State*, 525 P.2d 744, 746 n.2 (Wash. 1974) (en banc). Subsequently, Section 403(a) of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 79, 25 U.S.C. 1323(a), authorized the United States to accept certain retrocessions of jurisdiction previously assumed under Public Law 280. Washington thereafter enacted a procedure to permit retrocession of all jurisdiction other than the mandatory jurisdiction described in Section 37.12.010. See Wash. Rev. Code Ann. §§ 37.12.100-37.12.140 (1991). Pursuant to that procedure, Washington has retroceded to the United States all jurisdiction over the Reservation of the respondent Tribes other than the mandatory jurisdiction described in Section 37.12.010. See 52 Fed. Reg. 8372 (1987); Pet. App. B7.

person challenges a citation for a traffic infraction, state law does not entitle him to a jury trial, § 46.63.090(1), and the burden of proof on the State is only "to establish the commission of the infraction by a preponderance of the evidence," § 46.63.090(3).

4. On May 21, 1988, respondent Fry, a member of respondent Confederated Tribes of the Colville Reservation,[4] was stopped by a Washington State Patrol officer while driving his motor vehicle on a public road within the Tribes' Reservation. He was cited by the officer for violation of the speed restrictions set forth in Wash. Rev. Code Ann. § 46.61.400 (1991). Because this violation is not listed in Section 46.63.020, the officer issued Fry a civil complaint alleging that he had committed a traffic infraction. See Pet. App. A3, B1-B2.

5. Fry and the Tribes then commenced this action in the United States District Court for the Eastern District of Washington, contending that Public Law 280 does not authorize petitioners' attempt to enforce the State's civil traffic laws against Indians on the Reservation. The district court rejected respondents' contention and granted summary judgment for petitioners. Pet. App. B1-B20. Relying on this Court's decision in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the court concluded that petitioners' assertion of jurisdiction under

---

[4] Respondent is a federally recognized Indian Tribe, which was formed from eleven historical Tribes placed upon the Reservation shortly after it was established by two Executive Orders issued by President Grant in 1872. Exec. Order No. 33-1 (Apr. 9, 1872) (establishing Reservation); Exec. Order No. 33-2 (July 2, 1872) (amending boundaries of Reservation); see *Seymour* v. *Superintendent*, 368 U.S. 351, 354 (1962) (discussing formation of Reservation); *Tonasket* v. *State*, 525 P.2d 744, 745-746 (Wash. 1974) (en banc) (same).

Section 2 of Public Law 280 [5] could be sustained only if the infraction violated the State's "criminal/prohibitory" laws rather than its "civil/regulatory" laws. Pet. App. B12-B14.[6] Because the court was of the view that the State's "traffic 'infraction' code is designed to promote the strong public policy of protecting the safety and health of its citizens on public highways," *id.* at B17, it held that the state statute in question is a criminal law for purposes of the assumption of jurisdiction authorized by Section 2 of Public Law 280.

6. The court of appeals reversed. Pet. App. A1-A8. In Part I of its opinion, the court of appeals explained that the State's own characterization of its law made clear that the State's "public policy is served by treating speeding as a civil/regulatory offense." *Id.* at A6. In the court's view, this character-

---

[5] Because Washington was not one of the five States named in Section 2 of Public Law 280, and because Washington was one of the States named in Section 6, Washington technically could not assume criminal jurisdiction directly under Section 2, but instead could assume jurisdiction only by compliance with Sections 6 and 7. See *Yakima*, 439 U.S. at 474, 481. Section 6, however, permitted Washington to assume jurisdiction "in accordance with the provisions of this Act." 67 Stat. 590. Accordingly, the jurisdiction Washington could assume pursuant to Section 6 is substantively identical to the jurisdiction described in Sections 2 and 4 of Public Law 280. See *Yakima*, 439 U.S. at 495-496 (noting that the reference in Section 6 to the "provisions of [this] Act" suggests that other provisions of Public Law 280 clarify the substantive scope of the jurisdictional grant to Section 6 States).

[6] Petitioners have argued only that jurisdiction is proper under the grant of criminal jurisdiction in Section 2 of Public Law 280; they do not rely on the grant of civil jurisdiction in Section 4 of Public Law 280. See Pet. App. A5.

ization by the State is sufficient to preclude petitioners from claiming that the statute involved an exercise of criminal jurisdiction permitted by Section 2 of Public Law 280. Pet. App. A6-A7.

In Part II of its opinion, the court further explained (Pet. App. A7-A8) that the state statute should be considered as civil/regulatory under the public-policy analysis articulated in *Cabazon*, where the Court described the "shorthand test" to be whether the conduct in question "violates the State's public policy," 480 U.S. at 209; see *id.* at 209-212. The court of appeals expressed this view:

> *Cabazon* focuses on whether the prohibited activity is a small subset or facet of a larger, permitted activity—high-stakes unregulated bingo compared to all bingo games—or whether all but a basic activity is prohibited.

Pet. App. A7. Applying that analysis, the court of appeals reasoned that "although *speeding* remains against the state's public policy, * * * speeding is but an extension of driving—the permitted activity—which occasionally is incident to the operation of a motor vehicle." *Id.* at A7-A8. Accordingly, the court concluded that even under the *Cabazon* analysis applicable to a statute that imposes criminal penalties, the state statute would be treated as civil/regulatory in nature, and thus would not be enforceable against Indians in Indian country under the grant of criminal jurisdiction set forth in Section 2 of Public Law 280.

DISCUSSION

The court of appeals correctly held that the state statutory provisions governing the traffic infractions at issue here—which are expressly deemed by state law not to be "criminal offense[s]" and are instead

treated by the State as civil infractions—are not "criminal" laws for purposes of the grant of criminal jurisdiction over Indians on an Indian reservation under Section 2 of Public law 280. That ruling does not conflict with any decision of this Court or of any of the courts of appeals. It also does not leave a gap in enforcement of traffic laws on the Colville Reservation, because the Tribes have adopted their own traffic code that governs the same conduct. For these reasons, the petition for a writ of certiorari should be denied.

1. The provisions of the Washington traffic code that govern "traffic infraction[s]" are not within the scope of the "criminal" jurisdiction that a State may assume pursuant to Section 2 of Public Law 280.[7] The applicable state law, on its face, establishes as much. Washington's 1979 amendments were intended to decriminalize certain traffic offenses, including speeding. To that end, Washington law designates the violations at issue as "traffic infraction[s]" and expressly provides that "a traffic infraction may not be classified as a criminal offense." Furthermore, the Washington Supreme Court has characterized a traffic infraction as "civil" in nature, noting that "the procedures for adjudicating infractions are distinct from those required in criminal cases. See *City of Kennewick* v. *Fountain*, 802 P.2d 1371, 1373-1374 (1991). Because the State of Washington has made a deliberate policy choice to treat the traffic violations at issue here as civil rather than criminal for its own purposes, there is no reason why the State should not be taken at its word for purposes of determining

---

[7] Petitioners do not contend that the Washington laws governing traffic infractions fall within the grant in Section 4 of Public Law 280. See note 6, *supra*.

whether the laws governing traffic infractions fall within the criminal jurisdiction that a State may assume pursuant to Section 2 of Public Law 280.

To be sure, in *Cabazon* the Court held that the fact that California attached criminal penalties to a violation of a state gambling statute was not dispositive of the question whether the statute should be treated as "criminal" within the meaning of Section 2 of Public Law 280. The Court pointed out that in *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), it had interpreted Section 4 of Public Law 280 to grant the States jurisdiction over "private civil litigation involving reservation Indians," but "not to grant general civil regulatory authority," including the authority to tax. 480 U.S. at 208 (citing 426 U.S. at 385, 388-390). This interpretation was required, the Court explained, because Public Law 280 was not intended to effect "total assimilation" of Indian tribes, and because a grant of regulatory jurisdiction over Indians on a reservation "would result in the destruction of tribal institutions and values." 480 U.S. at 208. The Court then concluded:

> [T]hat an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280. Otherwise, the distinction between § 2 and § 4 of that law could easily be avoided and total assimilation permitted.

480 U.S. at 211.

Thus, the purpose of the inquiry in *Cabazon* was to determine whether a state statute that concededly *was* criminal nonetheless fell outside the general grant of criminal jurisdiction in Section 2 because the underlying statutory scheme to which the criminal

penalties were attached was regulatory (or civil) in nature. But *Cabazon* does not suggest that Section 2 allows a State to assume jurisdiction under a state statute that is not even ostensibly criminal in nature. That approach would substitute the underlying policies of Public Law 280 that the Court invoked in *Cabazon* as a means of *limiting* the reach of that statute into the equivalent of Public Law 280 itself, and thereby result in an expansion of state jurisdiction beyond that conferred even by the literal language of Section 2.[8] Accordingly, as the court of appeals held, when a State itself characterizes its own law as civil, the courts generally should accept that characterization at face value and hold that the statute is not within the criminal jurisdiction described in Section 2 of Public Law 280.

2. We are unpersuaded, however, by the analysis set forth by the court of appeals in Part II of its opinion. There, the court noted that the State generally permits driving on the highways and characterized speeding as a prohibited subset of this permitted activity. Accordingly, in attempting to apply *Cabazon*'s "public policy" analysis, the court indicated that the state statute would be treated as civil even if it did impose criminal penalties. Pet. App. A7-A8.

---

[8] Cf. *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990):

> It is one thing to suggest * * * that the policies underlying the act of state doctrine should be considered in deciding whether, despite the doctrine's technical availability, it should nonetheless not be invoked; it is something quite different to suggest that those underlying policies are a doctrine unto themselves, justifying expansion of the act of state doctrine * * * into new and uncharted fields.

In our view, this represents an overly wooden and intrusive application of the *Cabazon* analysis. Such a rule effectively would prohibit any State from enforcing traffic laws under Public Law 280, so long as the State permits driving on the highways. Moreover, the logical implications of this analysis could lead to sharp restrictions on the types of criminal laws enforceable under Public Law 280. For example, it might be argued that a state statute prohibiting illegal use of pharmaceuticals is only a regulatory law, because such use is only "a small subset or facet of a larger, permitted activity," Pet. App. A7—namely, use of prescription drugs.

A more commonsense application of the *Cabazon* analysis would operate at a lower level of generality, treating the relevant conduct here as speeding. Like many other traffic violations, speeding is traditionally understood in our society as a prohibited activity. Accordingly, if the traffic laws at issue here provided for criminal penalties, they generally would fall within the grant of criminal jurisdiction described in Section 2 of Public Law 280. Compare *St. Germaine* v. *Circuit Court*, 938 F.2d 75, 76-77 (7th Cir. 1991) (concluding that a criminal provision of a traffic code is enforceable under Section 2 of Public Law 280). Such a scenario would differ substantially from the situation presented in *Cabazon*, where California attempted to prevent Indians from conducting bingo games, even though California (like many other States) routinely permitted charitable organizations to conduct bingo games. 480 U.S. at 211. In sum, contrary to the court of appeals' opinion, we do not believe the *Cabazon* inquiry into whether a law is prohibitory or regulatory in nature should, absent unusual circumstances, operate to deprive the State of the ability to punish as a criminal offense conduct

that traditionally is prohibited in the operation of a motor vehicle. That issue is not presented here, however, because, as the court of appeals correctly reasoned in Part I of its opinion, the State of Washington does not in any event seek to punish the conduct at issue as a criminal offense.

3. We do not believe that the decision of the court of appeals presents an issue meriting review by this Court. The decision does not conflict with that of any other court of appeals. Petitioner's contention (Pet. 10-11) that it conflicts with the decision of the Seventh Circuit in *St. Germaine* is incorrect; as noted above, *St. Germaine* involved an offense that the State of Wisconsin indisputably treated as criminal, for which the defendant received a term of imprisonment of 190 days. See 938 F.2d at 75-76. By contrast, the instant case turns on the State's own characterization of the conduct as noncriminal. *St. Germaine* therefore is inapposite.[9] In fact, we are not aware of any other reported decision considering whether an offense that a State treats as civil nevertheless should be regarded as falling within the grant of criminal jurisdiction described in Section 2 of Public Law 280.

Finally, the decision of the court of appeals does not leave a jurisdictional void preventing enforcement of traffic laws on the Tribes' Reservation. To the contrary, the Tribes have enacted a traffic code applicable to the Reservation and have entered into cross-deputization arrangements with municipal and county officers patrolling the Reservation, so that all officers enjoy the capacity to enforce all applicable

---

[9] The *St. Germaine* court noted this distinction, explaining that another provision of the Wisconsin statute, "which does not carry a mandatory jail sentence and fine for first offenders, might to that extent be considered merely regulatory but that is not our case." 938 F.2d at 77.

laws; the Tribes also have offered such arrangements to the State, although the State has declined to accept them. See Pet. App. A8; Br. in Opp. 12-14. For this reason, and by virtue of the novelty of the legal issue, review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

ROBERT L. KLARQUIST
JACQUES B. GELIN
Attorneys

MARCH 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45367

(6)

NO. 91-569

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF WASHINGTON;
WASHINGTON STATE PATROL;
GEORGE B. TELLEVIK,

Petitioners,

v.

CONFEDERATED TRIBES OF
THE COLVILLE RESERVATION;
LAWRENCE FRY,

Respondents.

SUPPLEMENTAL BRIEF IN REPLY TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH O. EIKENBERRY
Attorney General
State of Washington

EDWARD B. MACKIE
Chief Deputy Attorneys General
Counsel of Record

WILLIAM BERGGREN COLLINS
Assistant Attorney General

Attorneys for Petitioners

7th Floor, Highways-Licenses Bldg.
Mail Stop: PB-71
Olympia, Washington 98504
(206) 753-6207

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

No. 91-569

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF WASHINGTON;
WASHINGTON STATE PATROL;
GEORGE B. TELLEVIK,

Petitioners,

v.

CONFEDERATED TRIBES OF
THE COLVILLE RESERVATION;
LAWRENCE FRY,

Respondents.

In response to this Court's invitation to express the views of the United States, the Solicitor General has recommended that the Petition for Writ of Certiorari be denied. The Washington State petitioners submit two short

observations about that response by the United States.[1]

1. If the writ is denied, the Ninth Circuit will apply the decision below, which the Solicitor finds to be flawed, to reservations that lie within its jurisdiction.

Although the United States would have this Court deny the writ, the Solicitor's brief candidly indicates that it is "unpersuaded, however, by the analysis set forth by the Court of Appeals in part II of its opinion." (U.S. Brief at 9.) That portion of the Ninth Circuit opinion expresses its construction of the principles enunciated by this Court in California

---

[1] This Supplemental Brief is filed pursuant to Rule 15.7, which authorizes a party to file a supplemental brief calling attention to intervening matters not available at the time of the parties last filing. The intervening matter in this case is the Brief for the United States as Amicus Curiae which was filed after Petitioners' Reply Brief.

v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

The United States' brief describes the Ninth Circuit's approach as "overly wooden" and goes on to suggest a "more commonsense application of the Cabazon analysis", (U.S. Brief at 10), than that employed by the Ninth Circuit. Although disagreeing with part II of the opinion, the Solicitor urges the Court to deny the writ because part I of the decision is correct.[2]

---

[2] The Solicitor also maintain that there is no conflict between the decision below and St. Germaine v. Circuit Court of Vilas Cy, 938 F.2d 75 (7th Cir. 1991). The Solicitor's analysis focuses on part I of the decision below. (U.S. Brief at 11.) However, as we pointed out in our petition (pp. 10-12), there is a conflict between St. Germaine and part II of the decision below. The Solicitor does not claim otherwise.

This ignores the fact that the Ninth Circuit will continue to apply a flawed analysis of Cabazon. Thus, the disagreement between the Ninth Circuit and the United States Solicitor is critical because the Ninth Circuit will continue to use their analysis, not the Solicitor's, in applying this Court's decision in Cabazon.

When one considers that a large number of the tribal reservations in the United States are included within the jurisdiction of the Ninth Circuit Court of Appeals, this difference in construction is thus an important matter that should be resolved by this Court.

2. The decision below either creates a jurisdictional void or permits the tribe to affirmatively preempt the state's jurisdiction.

The United States' brief recites that "the decision of the court of

appeals does not leave a jurisdictional void preventing enforcement of traffic laws on the Tribe's Reservation. To the contrary, the Tribes have enacted a traffic code applicable to the reservation and have entered into cross-deputization arrangements . . . ." (U.S. Brief at 11.) What the United States' brief overlooks is that there are twenty-four tribal reservations in the State of Washington. If the state lacks jurisdiction then there is void unless each Tribe chooses to enact and enforce traffic controls for their members.

In that context, the United States' observation that there is no void is in error unless the United States views the state's jurisdiction as being dependent upon the exercise of jurisdiction by the tribe. If so, then there is no void due

to the action taken by the Colville Tribe. But such a "springing jurisdiction" would authorize tribes, by their own action, to preempt the state. That would be a new and novel concept to view state jurisdiction vis-a-vis tribal members and such a concept should be subjected to scrutiny by this court.[3] The United States' brief thus focuses upon only one of the twenty-four reservations in Washington that is subject to being impacted by the Ninth Circuit decision. Such focus, while proper from the vantage point of the Colville Tribe, avoids the question of whether this Court should review the Ninth Circuit decision due to its

---

[3] As we noted in the State's Reply Brief (p. 3) the Question Presented by the Respondent also implies that the State's jurisdiction is somehow limited by tribal enforcement action.

broader impact. This decision is more than an impact upon a single tribal reservation.

Since the United States candidly admits the reasoning of the Ninth Circuit is flawed and, by implication, raises the novel question of "springing jurisdiction," we urge this Court to grant the writ.

DATED this 1st day of April, 1992.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

EDWARD B. MACKIE
Chief Deputy Attorney General
Counsel of Record

WILLIAM BERGGREN COLLINS
Senior Assistant Attorney General